127-85

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1306.

ATTERSON W. RUCKER, PLAINTIFF IN ERROR,

vs.

JEROME B. WHEELER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED NOVEMBER 21, 1887.

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1–31 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

* * * * * * *

32 *Second Amended Complaint.*

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the Circuit Court of the Eighth Judicial Circuit of the United States in and for said District.

ATTERSON W. RUCKER, Plaintiff,

vs.

JEROME B. WHEELER, Defendant.

The plaintiff, for a first cause of action, complains and alleges—

1st. That he is a resident of the city of Denver, county of Arapahoe, State of Colorado, and a citizen of said State, and that defendant is a resident of the city of New York, county and State of New York, and a citizen of said State of New York.

2nd. That heretofore, to wit, on or about the — day of October, 1884, one Julia Webber was the owner of a one-sixth interest in the Emma lode mining claim, situate in the county of Pitkin, State of Colorado, and said defendant, desiring to purchase the same, agreed with plaintiff that in case he assisted defendant and his agents in procuring the purchase of said one-sixth interest for a sum of money not exceeding forty thousand dollars defendant would pay to plaintiff the sum of ten thousand dollars for his services in that
33 behalf, and that in case defendant was compelled to pay for said interest a sum greater than the said sum of forty thousand dollars he, the said defendant, would pay the plaintiff for his services as aforesaid in that behalf the sum of five thousand dollars.

3rd. That by virtue of said agreement plaintiff rendered services to said defendant in the matter of said purchase, by which services said defendant and said Julia Webber were brought together and by which services said defendant was enabled to purchase the said interest of said Julia Webber at and for a sum exceeding said sum of forty thousand dollars, whereby defendant became indebted to plaintiff in the sum of five thousand dollars for his services aforesaid; that said purchase was effected on the 22nd day of November, 1884.

4th. That said defendant has not paid the said sum of five thousand dollars, nor any part thereof, though often requested so to do before the commencement of this action.

II.

And, for a second cause of action, plaintiff complains and alleges—

That he is a resident of the city of Denver, county of Arapahoe, State of Colorado, and a citizen of said State, and that defendant is a resident of the city of New York, county and State of New York, and a citizen of said State of New York.

34 1st. That heretofore, to wit, on the 29th day of November, 1882, one Henry Webber was the owner of an undivided twenty-sixtieths ($\frac{20}{60}$) of the Emma lode mining claim, situate in Gunnison, now Pitkin, county, Roaring Fork mining district, in the State of Colorado; that at said time one Archie C. Fisk was the owner of an undivided twenty-eight ($\frac{28}{60}$) thereof, and one Charles F. Abbey was the owner of the remaining undivided twelve-sixtieths ($\frac{12}{60}$) thereof, and that thereafter, to wit, on the 14th day of April, 1883, the said Archie C. Fisk commenced proceedings under the United States statutes in advertising the interest of the said Webber out of said claim on account of alleged non-payment of assessment work on said claim, the same having been claimed to be performed by the said Fisk for the year 1882; that after the period of publication of said advertisement the said Archie C. Fisk asserted a claim to the said mining claim of a one forty-eight sixtieths interest therein.

2nd. That on the 20th day of November, 1883, the said Archie C. Fisk leased to the said Charles F. Abbey the said forty-eight sixtieth in said claim, and on the 26th day of November, 1883, the said Henry Webber, being desirous of securing possession of said claim, procured from said Abbey a lease in the name of C. E. Nevitt, a brother-in-law of said Webber, of an undivided sixteen-sixtieths ($\frac{16}{60}$) of said claim; that said Nevitt was merely the nominal owner and lessee of said interest so procured by said Webber, and the same belonged to the said Webber; that thereafter, to wit, on the 18th day of April, 1884, by divers and mesne conveyances, the said defend-
35 ant became the owner of all the interest in said mining claim owned or claimed by said Fisk; that during the month of April, 1884, the said Henry Webber commenced a suit in the 5th judicial district court of said State against the grantor of said defendant and the administrator and heir-at-law of said Charles F. Abbey to recover his interest, to wit, the said $\frac{20}{60}$ of said premises.

3rd. That on the 28th day of April, 1884, the said Webber gave to plaintiff a quitclaim deed in and to an undivided five-sixtieths ($\frac{5}{60}$) interest in said premises as his compensation for legal services rendered and to be rendered in the prosecution of said last-mentioned action.

4th. That thereafter, to wit, on the — day of ——, 1884, the defendant and John Kinkade, administrator of the estate of said Abbey,

and the heir-at-law of said Abbey, by his next friend, J. M. Downing, commenced in said 5th judicial district court an action for possession of said premises against said Nevitt and to restrain said Nevitt and his agent, &c., from working and mining said premises.

5th. Plaintiff says that at the time of the making of the deed to him as aforesaid by said Webber it was agreed between them that his interest aforesaid would not be subject to the burden of the lease made by said Abbey to the said Nevitt, which was owned and controlled by said Webber; and plaintiff received said deed and entered upon the performance and performed the legal services necessary to be performed in and about said suit of the said Webber against the grantor of said defendant to establish the title of said Webber to said $\frac{2}{6}\frac{0}{0}$ interest aforesaid in consideration of said conveyance and agreement last aforesaid.

36 6th. That on the 26th day of September, 1884, the defendant was the owner of the whole of the interest of said Abbey, together with the interest claimed or owned by said Fisk; that on said day, and while plaintiff was acting as attorney for said Webber in the prosecution of his suit aforesaid and for the said Webber in the defense of the action brought against said Nevitt for the possession of said mine and for injunction, and for the purpose of compromising and settling the pending litigation between the parties to said actions, plaintiff, for and on behalf of said Webber and acting nominally for said Nevitt, together with the attorney representing the defendant herein, James M. Downing, prepared a certain agreement for the settlement of the controversies aforesaid and also for a distribution of the proceeds of said mine then on hand and the future production thereof, and that after the preparation thereof the same was signed, executed, and delivered by and between the parties thereto, namely, the said Webber, Nevitt, and defendant, and is in words and figures following, to wit:

"This agreement, made and entered into on this 26th day of September, A. D. 1884, by and between J. B. Wheeler, of the first part, and C. E. Nevitt, of the second part, and Henry Webber, witnesseth:

"That whereas the said party of the first part is the owner of certain interests in the Emma mine, situate in Pitkin county, State of Colorado, and a suit is now pending in the district court of said county on behalf of said Webber against said party of the first part and others for a one-third ($\frac{1}{3}$) interest in said mine; and whereas another suit is pending in said court in behalf of the said J. B. Wheeler and others against the said second party to recover
37 possession of said mine, and the said second party in his defense thereto claims to hold a lease of said mine expiring on the 20th day of November, 1884, in which said suit the district judge of said court has made an order allowing the possession of said property to remain in the hands of said second party during the period of said lease, two-thirds ($\frac{2}{3}$) of the proceeds thereof to be paid to one John Hulbert, receiver, to be held by him to await the determination of said suit or the further order of the court, less a roy-

alty of fifteen (15) per cent.; and whereas said party of the second part has been for some time in the possession of said mine and has extracted a large quantity of ore, a greater portion of which is now on hand undisposed of; and whereas said parties being desirous of compromising and settling said actions, it is agreed, in consideration of the premises, the said first party will, upon the ensealing of these presents, make, execute, and deliver a sufficient deed of quitclaim to said Webber, his grantees or assigns, for an undivided one-fourth (¼) interest in said mine, and said Webber, on the receipt of said deed, agrees to release, waive, and does hereby release and waive, unto said party of the first part all claims which he may have to any further or other interest in said property.

"And the suit aforesaid between said parties to be dismissed upon each party paying their own costs therein; that the suit aforesaid between said first party and said second party shall likewise be dismissed upon the same terms, and the said second party hereby releases and waives to said first party all right and title as to said lease save and except a one-third (⅓) interest therein, and at the end of said term to release and surrender the whole thereof and
38 possession thereunder peaceably to the owners of said property, their grantees or assigns.

"It is further agreed that the proceeds of the ore now on hand, after payment of the cost of production and after the payment of the costs of hauling and treatment, shall be divided as follows: The said party of the second part to receive one-third (⅓) thereof, less a royalty of 15% on said ⅓ interest, according to the terms set forth in his said lease, and the said party of the first part to receive three-fourths (¾) of the remaining two-thirds (⅔,) and the said Webber, his grantees or assigns, one-fourth (¼) of the said remaining two-thirds (⅔), and during the remainder of the term of said lease, namely, up to and inclusive of the 20th day of November, A. D. 1884, the proceeds of the mine to be divided in the same manner and in the same proportions aforesaid, such division also to apply to and include the said royalty to be paid by the said second party as aforesaid.

"And it is mutually agreed by and between the parties hereto that during the remainder of the term of said lease the said mine shall be under the superintendence of Joseph Ruse, who shall operate, work, and develope the said property for the mutual interest of all the parties hereto, and with a view of developing and preserving the said property as a workable mine as well as the production of ore therefrom, said work to be done by said Joseph Ruse in as economical a manner as possible, and to limit the production therefrom so as to correspond to the expense incident to mining and the price for which said ore can be sold, and any failure upon the part of
39 said Joseph Ruse to comply with the conditions herein mentioned shall be cause for removal from such position of superintendent.

"The said Joseph Ruse, during his continuance as superintendent, shall be under the advisory control of said first party, and the said second party and the said Webber shall have the right at all times

to make suggestions in the matter of the authority of the said party of the first part respecting the management of said mine.

"In witness whereof we hereto set our hands and seals on the day and year first hereinabove written.

"J. B. WHEELER. [SEAL.]
"C. N. NEVITT. [SEAL.]
"HENRY WEBBER. [SEAL.]

"(Endorsed:) State of Colorado, county of Pitkin, *ss:* Filed for record at 2.40 o'clock p. m., Oct. 16, 1884, and duly recorded in book 17, page 290. Fees, 4.00. Wm. B. Root, recorder, by C. W. Brooks, deputy."

40 7th. Plaintiff says that at the time of the signing and execution of the foregoing agreement by the said defendant he, the said defendant, knew that said Nevitt was representing the said Webber, and that said lease in fact was owned by the said Webber, and that pl'ff was entitled to $\frac{5}{6}\frac{5}{0}$ths of the proceeds of said mine out of the $\frac{1}{6}\frac{0}{0}$ths thereof awarded to said Webber under and in virtue of said agreement; that, in pursuance of said agreement, the management and control of the working of said mine was given over to the said defendant; that the proceeds of all ore on hand at that time and all that was produced from said mine up to the 21st day of October, 1884, was placed in the banking-house of J. B. Wheeler & Company, a firm doing business in the town of Aspen, Pitkin county, Colorado, the said J. B. Wheeler being the defendant herein and who controlled the business of said bank, and that as the proceeds of said mine became due the same were on the books of said bank placed to the credit of said mine.

8th. And plaintiff further says that on the 21st day of October, 1884, defendant purchased the leasehold interest on said mine from said Nevitt, who was acting for said Webber as aforesaid, and took an assignment thereof to himself; that by virtue of said purchase he became entitled to twenty-sixtieths ($\frac{2}{6}\frac{0}{0}$) more of the ore then on hand and twenty-sixtieths ($\frac{2}{6}\frac{0}{0}$) more of the ore which was produced thereafter until and inclusive of the 21st day of November, 1884.

9th. That on the 17th day of November, 1884, the said Henry Webber sold his said interest in said mine, to wit, ten-sixtieths ($\frac{1}{6}\frac{0}{0}$), to one Julia Webber, his wife, and the said Julia Webber, on the 22nd day of November, 1884, sold and conveyed her interest in said mine, to wit, ten-sixtieths ($\frac{1}{6}\frac{0}{0}$), to the said defendant.

41 10th. And plaintiff says that up to the time of the sale of said interest by the said Julia Webber to the defendant there had been a large sum of money realized from the sale of ore taken from said mine, and there was up to said time also a large amount of ore unsold on hand and which had since the 26th day of September aforesaid been extracted from said mine; that no part of the money thus realized, however, was paid over to the said Nevitt or to the said Henry or Julia Webber, but the same remained in the banking-house aforesaid to the credit of the mine as aforesaid; that at the

time of the purchase of the leasehold interest aforesaid by said defendant there was due to the plaintiff on account of his five-sixtieths interest aforesaid out of the ten-sixtieths of the proceeds of said mine accorded to the said Webber and his grantees and assigns by virtue of the agreement of the 26th day of September aforesaid a balance in the sum of two thousand two hundred sixty-two dollars and thirty cents ($2,262.30), and that on the 22nd day of November, 1884, at the time of the purchase of said Julia Webber's title by defendant, there was the further sum of two thousand six hundred thirty dollars and sixty-six cents ($2,630.66) balance due plaintiff on the same account, and that on the dates last aforesaid the said defendant caused the said amounts, aggregating the sum of four thousand eight hundred ninety-two dollars and ninety-six cents ($4,892.96), to be placed to his own account and converted the same to his own use.

11th. And, further complaining, plaintiff says that at the time of the purchase of said leasehold interest and at the time of the purchase of said Julia Webber's title by the defendant the said
42 defendant well knew that the plaintiff and the said Henry Webber had agreed at the time of the plaintiff obtaining his title aforesaid that plaintiff's interest was not subject to the burden of said lease, and that he, the said plaintiff, was to receive out of the interest of the said Webber, as the grantee of said Webber, his full one-twelfth share and interest in the ore produced and to be produced from said mine, and he well knew that by virtue of the terms of said agreement of the 26th day of September, 1884, plaintiff was entitled to his five-sixtieths of the proceeds of all ores extracted from said mine out of the ten-sixtieths aforesaid accorded to the said Webber by virtue of said agreement.

12th. That by virtue of the sale made by said Henry Webber to the said Julia Webber no part of the proceeds of said mine theretofore produced were sold to said Julia Webber, and that when said Julia Webber received said conveyance she also knew that plaintiff's five-sixtieths interest in the proceeds of the ore theretofore extracted from said mine was to come out of the ten-sixtieths thereof accorded to said Henry Webber under and by virtue of said agreement of the 26th of September, 1884, and that she also knew and understood that by virtue of said agreement made between the plaintiff and said Henry Webber at the time of his conveyance to said plaintiff that his, said plaintiff's, interest was not subject to the burden of said leasehold interest, and that said leasehold interest was owned and controlled by said Henry Webber.

13th. That no part of said sum of $4,892.96 has ever been paid by defendant to plaintiff.

Wherefore, by reason of the premises, plaintiff says that defendant is indebted to him in the sum of five thousand (5,000)
43 dollars for commission aforesaid, and the further sum of four thousand eight hundred ninety-two and ninety-six one-hundredths (4,892.96) dollars for and on account of money received to the use of plaintiff as aforesaid, with interest on said sum of $5,000 from the 22nd day of November, 1884, and on the sum of two thousand two hundred sixty-two and thirty one-hundredths (2,262.30)

dollars from the 21st day of October, 1884, and on the said sum of two thousand six hundred thirty and sixty-six one-hundredths (2,630.66) dollars from the 22nd day of November, 1884, and for costs of suit.

(Signed) WILLARD TELLER & L. J. LAWS,
Att'ys for Pl'ff.

(Endorsed:) 1794. A. W. Rucker, pl'ff, *vs.* Jerome B. Wheeler, d'f't. 2nd amended complaint. Filed Feb. 27, 1886. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 7th day of April, A. D. 1886, came again the said defendant, by Patterson & Thomas, his attorneys, and filed in said court and in said cause his answer to the second amended complaint herein.

And the said answer is in the words and figures as follows, to wit:

44 *Answer to Second Amended Complaint.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit of the United States in and for said District.

ATTERSON W. RUCKER, Plaintiff,

vs.

JEROME B. WHEELER, Defendant.

The defendant, answering the second amended complaint of the plaintiff herein, says—

First. He admits the citizenship of the parties as stated in said second amended complaint.

Second. He admits that during the month of October Julia Webber was the owner of a sixth interest in said Emma mine, as set out in said complaint, but he denies that, desiring to purchase the same or otherwise, he agreed with the plaintiff that in case he assisted defendant and his agents in procuring the purchase of said interest for a sum of money not exceeding $40,000 or any other sum he would pay the plaintiff the sum of $10,000 or any other sum for his services in that behalf or otherwise; and he denies that he agreed that in case he was compelled to pay for said interest a sum greater than the said sum of $40,000 or any other sum he, the defendant, would pay the plaintiff for his services in that behalf or in any respect the sum of $5,000 or any other sum of money.

Third. He denies that by virtue of said agreement or at all plaintiff rendered any services to said defendant in the matter of said purchase or in any other matter by which service the said defendant and the said Julia Webber were brought together, or by which

said services defendant was able to purchase said interest or
45 any interest of said Webber at and for a sum exceeding $40,000 or any other sum, or that defendant became indebted to plaintiff in the sum of $5,000 or any other sum whatever.

And the defendant, answering to the second cause of action of the plaintiff, admits the citizenship of the parties as therein set out.

He admits the ownership of the said Emma mine on the 29th day of November, 1882, as set forth in the first paragraph of said second cause of action in said second amended complaint, and that the interest of Henry Webber therein was advertised out by the said Fisk, as stated in said complaint.

Second. He admits the making of the lease to Charles F. Abbey, as set forth in the second paragraph of said second amended complaint, but whether on said 26th day of November, 1883, or at any other time the said Webber procured a lease from said Abbey in the name of C. E. Nevitt, the brother-in-law of said Webber, of an undivided sixteen-sixtieths of said claim or whether the said Nevitt was merely a nominal owner and lessee of said interest so procured this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief. He admits that on the 18th day of April, 1884, the defendant became the owner of all the interests in said mining claim owned or claimed by said Fisk. He admits the commencement of a suit during the month of April, 1884, by the said Webber, as set forth in the second paragraph of said complaint, and also alleges that the said Webber previously thereto and to wit, during the month of January of said year, did also commence an action against the said Fisk for the same purpose.

Third. Defendant admits the making of the deed from Webber to the said plaintiff, as set forth in the third paragraph of said complaint.

Fourth. He admits the commencement of the suit by the defendant, John Kinkaid, administrator, against the said Nevitt, as set forth in the fourth paragraph of said second cause of action of said complaint.

46 Fifth. He denies that at the time of the making of the deed to the defendant by the said Webber, or at any other time, it was ever agreed between them that the plaintiff's interest would not be subject to the burden of the lease made by said Abbey to said Nevitt, which was owned and controlled by said Webber, but admits that the plaintiff received the said deed and entered upon the performance of the legal services necessary to be performed in and about the said suit of the said Webber, as set forth in the fifth paragraph of the second cause of action of said second amended complaint.

Sixth. The defendant admits the making of the agreement set forth in the sixth paragraph of said complaint on the 26th day of September, 1884, and alleges that when the same was made the said plaintiff was acting as the attorney, both of the said Webber and the said Nevitt, in and to the premises, and that the said instrument was prepared by James M. Downing, attorney for the defendant, sub-

ject to suggestions and conditions made and suggested by the said Webber, Nevitt, and the plaintiff, as their attorney.

Seventh. The defendant denies that he knew, either at the time of the signing and execution of the said agreement or at any time, that the said Nevitt was representing the said Webber or that said lease was owned by the said Webber, and he denies that the plaintiff was entitled to five-sixtieths of the proceeds of said mine out of the ten-sixtieths thereof awarded to said Webber under and by virtue of said agreement, but alleges that said plaintiff was paid all and singular the moneys coming to him by virtue of the terms thereof.

He admits that all proceeds of ore on hand and ore produced up to the 21st day of October, 1884, was placed in the banking-house of J. B. Wheeler & Co., the defendant being the principal owner in said bank; but he also alleges that the part and proportion of the profits due to the said plaintiff was paid to him whenever the same became due, and frequently before the maturity thereof.

47 Eighth. He admits that on the 21st day of October, 1884, or thereabouts, the leasehold interest in said mine was purchased from said Nevitt, and that the same was originally purchased by W. B. Devereux, his agent, acting in his own behalf, the said purchase being long thereafter ratified by this defendant; and he denies that at the time of said purchase or at any time the said Nevitt was acting for said Webber, either to his knowledge or in fact.

He denies that by virtue of said purchase he became entitled to twenty-sixtieths more of the ore produced thereafter until and inclusive of the 21st day of November, 1884, save as provided in the terms and conditions of said lease—that is to say, that he was entitled to one-third of the proceeds plus a royalty of fifteen per cent. on said third interest, according to the terms set forth in the said lease.

Ninth. He admits the sale by the said Henry Webber to Julia Webber and by Julia Webber to the defendant of her interest in and to the said mine.

Tenth. He admits that up to the time of the said sale of said interest by the said Julia Webber to the defendant there had been a large sum of money realized from the sale of ore taken from the said mine, together with a large amount unsold; and he admits that the moneys belonging to the said interests were by him purchased with the said interests, and that he consequently realized the amount thereof; but he denies that any part or portion of the said proceeds of ores belonging to the said plaintiff were ever withheld from him, but alleges that the same were paid to him in full.

He denies that at the time of the purchase of said leasehold interest or at any time there was due to the plaintiff on account of any five-sixtieths interest out of the ten-sixtieths of the proceeds of said mine accorded to the said Webber and his grantees and assigns, by virtue of the said agreement or otherwise, a balance in the

48 sum of two thousand two hundred and sixty-two dollars and thirty cents or any other sum, or that on the 22nd day of November, 1884, or at any other time there was due the further sum of twenty-six hundred and thirty dollars and sixty-six cents on the same account or on any account, or that on the dates last aforesaid or at

any time the defendant caused said amounts to be placed to his own account or converted the same to his own use, but, on the contrary, alleges that the said defendant received his full share of all the net proceeds of ores taken from said mine according to the terms of said contract.

The defendant, further answering, says he denies that at the time of said purchase of said leasehold interest or at the time of the purchase of the said Julia Webber's title by the defendant or at any time he ever knew, but, on the contrary, he denies that the plaintiff and the said Henry Webber had ever agreed, at the time of the plaintiff's obtaining his title as aforesaid or at any time, that plaintiff's interest was not subject to the burden of said lease or that plaintiff was to receive out of the interest of said Webber, as the grantee of said Webber, his full one-twelfth share or interest of the ore produced or to be produced from said mine, and denies that he well knew or knew at all, either by virtue of the terms of said agreement on the 26th day of September, 1884, or at any other time, that the plaintiff was entitled to five-sixteenths ($\frac{5}{16}$) or any other amount of the proceeds of ores extracted from said mine out of the ten-sixteenths accorded to the said Webber by virtue of the said agreement or any other sum, but, on the contrary, alleges that the said plaintiff was to receive his proportion, to wit, five-sixtieths, of the proceeds of all of said ores less the proportion which the five-sixtieths interest should bear of the burden of the said lease upon the said one-third interest on said mine.

Twelfth. He denies that by virtue of the sale made by the said Webber to the said Webber no part of the proceeds of the said
49 mine theretofore produced were sold to said Webber or that when the said Julia Webber received said conveyance she knew that plaintiff's five-sixtieths interest in the proceeds of the ore theretofore extracted from said mine was to come out of any ten-sixtieths thereof accruing to said Webber under or by virtue of the the said agreement of the 26th day of September, 1884, or that she knew or understood that, by virtue of said agreement or any agreement, the plaintiff's interest was not subject to the burden of the said leasehold interest or that said interest was owned or controlled by said Webber.

Thirteenth. He denies that the said sum or any part thereof is due to the plaintiff by the defendant.

And, for a further additional answer to the said second amended complaint, as well as for a counter-claim, the defendant says that on, to wit, the 15th day of March, 1885, the plaintiff did collect, receive, and receipt for the sum of three hundred and fifteen dollars, being the amount due to one Clinton Markell as his tenth part of the proceeds of certain ores sold from the said Emma mine by the said plaintiff during the month of February, 1885, which said sum of money was, as aforesaid, by the plaintiff received and collected without the knowledge or consent of the said Clinton Markell, who was then and there entitled to the same.

Second. That no part or portion of said sum of $315.00 has ever been paid by the said defendant.

That on, to wit, the 13th day of July, 1885, the said claim, account, and demand of the said Clinton Markell was by him duly assigned, for value received, to this defendant; that no part of the same has been paid to this defendant.

Wherefore the defendant asks judgment against the plaintiff for the sum of $315.00, with interest thereon from the first day of April, 1885, and for costs of suit.

(Signed) PATTERSON & THOMAS,
Attorneys for Defendant.

50 (Endorsed:) 1794. U. S. circuit court, district of Colorado. A. W. Rucker *vs.* Jerome B. Wheeler. (1.) Answer to 2nd amended complaint. (2.) Counter-claim. Filed Apr. 7, 1886. (Signed) Edward F. Bishop, clerk. Patterson & Thomas, attorneys for defendant.

And afterwards and on, to wit, the 29th day of April, A. D. 1886, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his reply to the answer to second amended complaint heretofore filed herein.

And the said reply is in the words and figures as follows, to wit:

Reply.

In the United States Circuit Court, District of Colorado.

A. W. RUCKER *vs.* J. B. WHEELER.

Now comes the plaintiff and, replying to the answer filed herein, says:

That it is not true that the part and portion of the profits due to plaintiff was paid to him whenever the same became due, and that the same was frequently paid before the maturity thereof.

51 Denies that he was to receive, by virtue of the agreement set out in plaintiff's complaint, five-sixtieths of the proceeds of all of said ores, less the proportion which the fifteen-sixtieths interest should bear to the burden of said lease upon the one-third interest on said mine.

Plaintiff says he admits receiving the sum of three hundred and fifteen dollars for the use of said Clinton Markell, but he says he was at said time mentioned in said answer, as a cotenant of said Markell, engaged in working said mine for the joint benefit of said Markell and his other cotenants, and was also working said mine both by right of such cotenancy as well as by the special instance and request of said Markell; that while he was so working the same he incurred large expense and made large disbursements for and on behalf of the owners thereof; that, at the instance and request of the said Markell, he was compelled to expend large sums of money in defense of lawsuits brought by defendant against plaintiff, said Markell, and other owners of said mine; that he also rendered his

personal legal and other services in and about the management and working of said mine and in the defense of said suits, by means of which the said sum of $315 has been properly expended as a part of the sum chargeable to the interest of said Markell.

Denies that the said Clinton Markell has ever demanded payment of the said sum from plaintiff.

Denies that such account has ever been assigned by said Markell to the defendant.

(Signed) WILLARD TELLER & L. J. LAWS,
Att'ys for Pl'ff.

52–56 (Endorsed:) 1794. A. W. Rucker *vs.* J. B. Wheeler. Reply. Filed Apr. 29, 1886. (Signed) Edward F. Bishop, clerk. Willard Teller & L. J. Laws, att'ys for pl'ff.

* * * * * * *

57 And afterwards and on, to wit, the 28th day of February, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Judgment. Time for Bill of Exceptions.

ATTERSON W. RUCKER
vs. } 1794.
JEROME B. WHEELER.

Money demand. Attachment.

58 At this day comes the said plaintiff, by Willard Teller, Esq., his attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

And thereupon the said defendant, here in open court, saith he will no further prosecute his counter-claim herein against the said plaintiff.

And the motion of the said plaintiff for a new trial of the issues herein joined having heretofore come on to heard and having been argued by counsel and by the court taken under advisement and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

And thereupon the said defendant moves the court for judgment herein.

Wherefore is is considered by the court that the said defendant go hence hereof without day and have and recover of and from the said plaintiff his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And day until sixty (60) days from this day is allowed the said plaintiff to file herein his bill of the exceptions reserved by him upon the trial of the issues herein joined, and bond upon writ of error herein shall be in the sum of one thousand dollars ($1,000.00).

And afterwards and on, to wit, the 18th day of April, A. D. 1887, came again the said plaintiff, by his attorneys aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein.

59 And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court of the United States, District of Colorado.

ATTERSON W. RUCKER *v.* JEROME B. WHEELER.

Be it remembered that on this — day of March, 1887, this cause coming on for trial upon the merits, to maintain the issues upon his part the plaintiff gave in evidence to the jury as follows:

A. W. Rucker, plaintiff, proved that during all the transactions mentioned in the evidence he was a practicing attorney-at-law, and also evidence tending to show that he had some talk with defendant at Aspen, Colorado, about the 20th day of September, 1884, when the defendant asked him to purchase Webber's interest in the Emma mine at Aspen, Colorado; that plaintiff declined to do so because of his relations as attorney to Webber. About the 20th of October, 1884, after his relations with Webber had ceased, Charles A. Judkins and Walter B. Devereux employed him to make purchase of Webber's interest in said mine for themselves, and defendant agreeing if they could purchase for forty thousand dollars or less that his compensation should be ten thousand dollars; if they had to pay more, he should be paid five thousand dollars; he proceeded to negotiate for the purchase of said interest upon said agreement. About ten days thereafter Henry Webber, acting for his wife, Julia

60 Webber, with whom the said negotiations were being conducted, started to New York and without plaintiff's knowledge; at the time defendant lived in New York, and Webber sold his wife's interest directly to defendant for the sum of forty thousand dollars or more; that immediately after the departure of Webber plaintiff went to Leadville in search of Webber and ascertained that he had gone to New York, and plaintiff wrote a letter immediately to said Devereux, at Aspen, informing him thereof; that in April, 1885, plaintiff was employed by Henry Webber to bring suit for a one-third interest in the Emma mine; that the title to the one-third interest stood in the name of defendant, who was the grantee of one A. C. Fiske; that Fiske claimed title in virtue of a proceeding under section twenty-three hundred and twenty-four (2324) of the Revised Statutes of the United States for Webber's failure to do the assessment work for the year 1882. Webber told plaintiff at the time of his employment that Fiske had, on the 20th of November, 1883, leased to Charles F. Abbey forty-eight sixtieths ($\frac{48}{60}$) of the Emma mine, and that Webber's twenty-sixtieths ($\frac{26}{60}$) was included in the lease; that Webber, not wishing to recognize Fiske's title to his part, had, on the 26th day of November, 1884, procured an assignment of

one-third of the forty-eight sixtieths in the lease from Abbey and had put it in the name of his brother-in-law, C. E. Nevitt, and Webber was then working the property, but had not yet struck ore, but was expecting to very soon; Webber further told plaintiff that Abbey was not carrying on work under the lease, nor was he working his interest in the mine, but had abandoned work on the mine; that Webber only claimed an interest in the lease to
61 the extent of sixteen-sixtieths of the mine; that plaintiff informed Webber, when he gave him the deed, that under it he would be entitled to one-twelfth of the proceeds of the mine and out of Webber's interest in the event of the successful ending of the said suit or a compromise by Webber; that Webber consented to such understanding and agreement and delivered said deed with the full understanding that plaintiff should have one-twelfth of the proceeds independent of said lease out of his interest in the mine; that the mine began to produce in the month of August following, and on the 26th day of September, 1884, an agreement of compromise was made between defendant Webber and Nevitt, which agreement is set forth in the amended complaint in this cause; that at the time said agreement was made Webber, still desiring to keep it a secret that Nevitt was his agent, had the interest in the lease provided for in the agreement put in Nevitt's name; that between the time ore was struck and this agreement was made a large quantity of ore had been mined and some of it had been sold by Webber through Nevitt, and on the night of the day the agreement was made and the deed made from Wheeler to Webber of a one-fourth interest in the mine Webber and plaintiff had a settlement, wherein was included one-twelfth of the proceeds of such ore as had been sold by him; that he received an order from Webber signed by Nevitt upon defendant for such sum to come out of the funds in the hands of a smelter, of which defendant was part owner, the same being part of the proceeds of ore sold which the said Webber had not then collected; upon presenting the order he informed defendant it was partly for his one-twelfth of the proceeds of the ore sold before the settlement, and the defendant paid such order; that of the proceeds of the output of said mine between the 26th day of September, 1884,
62 and the 20th of November following he has received an amount equal to one-eighteenth only On the sixth day of February, 1885, defendant commenced to cause a suspense account to be carried in the books of said mine, and from the proceeds of said mine thereafter kept back an amount equal to one thirty-sixth of the proceeds from the 26th of September, 1884, which amount aggregates four thousand eight hundred and ninety-two dollars and ninety-six cents ($4,892.96), which is the amount agreed upon in the stipulation filed in this cause; that after this suit was commenced this amount was transferred by defendant to his own account; that none of the proceeds of the mine was ever paid to either Webber or his wife.

Plaintiff further testified that every time he called for money due his interest from the mine he demanded it with the royalty left off, saying he was not entitled to royalty, and always believed and still

believed he had not received any portion of the royalty. In making his demand for a settlement to embody in the stipulation offered in evidence he asked that the computation be made not including any royalty, and he believed that had been done; that if he ever received any royalty he did not receive it as such, but all payments made to him were made on account of his one-twelfth interest in the mine; that he never examined the books and did not know how his account was kept with reference to the royalty until after this suit was commenced, nor could he then ascertain that any royalty had ever been paid him; that at the time he purchased of Webber he was only working the interest obtained by the assignment from Abbey; that Abbey had abandoned work thereon before such assignment was obtained.

63 To further maintain the issues on his part the plaintiff offered the testimony of Charles A. Judkins, which tended to show that he made a contract with the plaintiff, as stated in plaintiff's testimony; that Devereux told him he thought defendant would take an interest with them in the purchase of the Emma lode; he saw Devereux write a letter or telegram concerning the matter to defendant; that Devereux told him he must get plaintiff to make the purchase—that he was the only one who could negotiate with Webber; that the plaintiff reported to him from day to day the progress made in the negotiations, and that he in turn reported to Devereux; that Devereux informed witness he could not make any purchase of real estate in Pitkin county without including the defendant in such purchase.

Thomas A. Rucker, another witness, testified that he was a brother of the plaintiff, and that, before the purchase of the interest by defendant from Julia Webber, Devereux told witness that plaintiff's interest was not burdened by the lease upon the mine.

Plaintiff offered in evidence an assignment of an undivided $\frac{1}{6}\frac{6}{0}$ths interest in a lease on the Emma mine from Chas. F. Abbey to C. E. Nevitt, of date the 26th of November, 1883; also a deed from Henry Webber to Julia Webber of one-sixth interest in the Emma mine, which said deed did not convey any of the product of the said mine, dated Oct. 17th, 1884.

Plaintiff then read in evidence the deposition of Henry Webber:

HENRY WEBBER, being sworn, testified as follows:

64 My name is Henry Webber, and I am 46 years of age, and reside in Aspen, Pitkin county, Colorado. I am acquainted with Jerome B. Wheeler, C. A. Judkins, Wm. B. Devereux, and the plaintiff, A. W. Rucker. I know the Emma mine. I was the owner of a lease on the Emma mine, which was in the name of C. A. Nevitt, and was the owner of it from the time of its execution until it, the lease, was sold.

Questions by A. W. RUCKER, counsel for plaintiff:

Q. What conversation, if any, did you have with Wm. B. Devereux and C. A. Judkins with reference to the lease upon the Emma

mine and the plaintiff's right to the ore taken from the mine under the lease?

(Objected to by Mr. Downing, defendant's counsel, upon the ground no foundation has been laid showing that the defendant would in any way be bound by any conversation had between Devereux, Judkins, and the witness.)

A. I had a conversation with Mr. Devereux, and I think Mr. Judkins was present. This conversation was in the court-room in the office of the county judge. It was some time after the settlement on the 26 of September, 1884, and before the sale of the lease. The conversation came up in a kind of general way about the ore of the Emma mine. Mr. Devereux told me that Mr. Rucker's, the plaintiff's, interest was not subject to the lease, and that there was not so much coming to the lease as I had been figuring on.

Q. Did you have any further conversation with Mr. Devereux?

A. Not as I recollect.

Q. When and where did the conversations with Judkins take place?

A. I had a conversation with Judkins in Simon Wachtel's one evening, wherein he told me and tried to convince me that Mr. Rucker's interest was not subject to the lease. I supposed he was figuring on trying to buy the lease. I do not know it, but
65 the way things turned out afterwards it looked as though this was his idea.

Q. Any other conversation?

A. I have had lots of conversations with Judkins, but do not know as I can call anything definite to mind; it was generally about mining sales; he was talking to me at different times; I remember that conversation, because we got into a heated controversy, as I claimed to the contrary about the lease.

Q. About what length of time were these conversations with Judkins and Devereux before the purchase by Judkins of the lease?

(Objected to as incompetent and immaterial.)

A. Well, I cannot tell, and cannot tell within a week; both of these conversations were within ten days after the 26th of September, 1884; it may have been a week and maybe more.

Q. You stated that you had several conversations with Judkins. Did they extend up to the time of the purchase of the lease?

(Objected to as leading, incompetent, and irrelevant.)

A. Well, they did not, because after this conversation and after the settlement Judkins kind of let me alone for a long time.

Q. What conversation, if any, did you have with plaintiff with reference to the sale of your interest or the interest of your wife in the Emma mine?

(Objected to by defendant's counsel as incompetent and irrelevant, no foundation having been — to show that any such conversation would in any way be binding upon the defendant.)

A. Right away after the 26th of September plaintiff came to me and asked me if I did not want to sell out. I told him I wouldn't care if I got my price. He wanted to know what that was,
66 and I told him forty thousand dollars, and he got an option for ten days; I won't be positive; ten days or two weeks; it was not longer than two weeks.

Q. Does the price of forty thousand dollars include the ore or money on hand?

(Objected to.)

A. I don't remember any conversation to that effect or any agreement to that effect; it was simply these words used—the interests of Mrs. Webber or our interest, as it was usually termed.

Q. After the option that you spoke of had expired did you have any further conversation with the plaintiff concerning the selling of the interest?

(Objected to by defendant's counsel for the reason that any such conversation is irrelevant and immaterial, it not having been shown that defendant would be bound thereby.)

A. I do remember of one conversation to that effect distinctly—that is, where the plaintiff tried to get me to sell out and put the money into the Aspen mine.

Q. When was that conversation, with reference to the time you did sell?

A. Well, I cannot state the time, but it was before I sold; it was after the option had expired and before I sold; I cannot tell what time it was.

Q. How often did plaintiff speak to you about selling out?

(Objected to by defendant's counsel for the same reason — that above given.)

A. He spoke to me so many times and advised me to sell out that I cannot tell how many times.

67 Q. Now, I will ask you this question: What reason did plaintiff offer to you why you should sell?

(Objected to by defendant's counsel as immaterial and incompetent.)

A. I do not remember of any particular reason that he advised, only general principles.

Q. State what influence, if any, plaintiff's advice in that matter had upon you.

(Objected to for the reason that it has not been shown that the advice to witness as to the conversations held between witness and the plaintiff were at the instigation of or with the knowledge of or consent of the defendant.)

A. I cannot answer it. I cannot define it. I never learned the English language well enough to describe it. I cannot answer it.

Q. Did plaintiff's advice have any influence upon your action with reference to the sale of your interest?

(Objected to for the same reason as last above.)

A. Yes; it did.

Q. In pursuance of this advice did you subsequently sell the interest of your wife; and, if so, to whom?

(Objected to for the same reason and that it is irrelevant and immaterial.)

A. I sold my wife's interest to Jerome B. Wheeler in pursuance of the advice and actions of plaintiff.

Cross-examination by Mr. DOWNING, on the part of the defendant:

Q. In pursuance of that advice was you induced to sell to Mr. Wheeler or would you have sold to any one who would have
68 given you your price?

A. I would have sold to any one else giving me my price.

Q. Did the plaintiff advise you to go to Mr. Wheeler and make this sale?

A. He did not.

Q. Did you go to Mr. Wheeler on the advice of plaintiff at all?

A. No, sir.

Q. Did he tell you that a sale could be made to Wheeler?

A. No, sir.

Q. Did he know that you were going to Wheeler wi n you went?

A. No, sir.

Q. As a matter —, you did go to New York and see about the sale?

A. Yes, sir.

Q. Did he, Rucker, claim to be acting as the agent of Wheeler at this time?

A. He did not.

Q. As a matter of fact, was he acting as your attorney at this time with reference to this interest, and had he been acting at times previous thereto?

A. He had been previous thereto, but at that time I had no case pending.

Q. Was he your general attorney at that time?

A. I have always looked upon him as such.

Q. A general adviser with reference to the management of the property?

A. I looked upon him as such.

Q. At the time you went to New York and saw Wheeler with reference to that sale did you have a suit pending with Nev-
69 itt with reference to money claimed to be due you on account of the sale of a leasehold interest in said property which you owned or claimed to own in the settlement of Sep. 26th?

A. I cannot state whether that suit was pending at that time or not.

Q. Who was your attorney in that suit?

A. Mr. Rucker.

Q. Did Mr. Rucker, at any time pending negotiations for the sale or purchase of your wife's interest, tell you that he was acting as the agent of J. B. Wheeler in the matter of the purchase?

A. No, sir.

Q. Over what period of time did these several conversations which you have mentioned with Devereux and Judkins extend as with reference to the settlement of September 26th, 1884?

A. Oh, it might have been six weeks; I don't think it was longer than two.

Q. After that you say that Judkins left you alone?

A. Yes; as regards the lease. Judkins was all the time trying to buy my interest.

Q. Who was it you gave the ten days' option to?

A. It was to Mr. Rucker; Judkins had nothing to do with it.

Q. At what time was it given?

A. It was, maybe, a week thereafter, and it run, I think, about two weeks.

Q. Was that a written or a verbal option?

A. It was a verbal option.

Q. What, if anything, was done by Rucker under that option?

A. I do not know what he did as regards the matter; noth-
70 ing that I know of.

Q. At what time was this conversation which you have mentioned as having had with Mr. Devereux in the office of the county court?

A. I cannot now fix the time only in reference to the 26th of September. I am positive it was within ten days. It may not have been but a week.

Q. Was it before or after this option was given to Rucker?

A. I cannot state. I do not know whether it was before or after.

Q. Was it before or after the option expired?

A. I think it was before the option expired.

Q. You say you had numerous conversations with Judkins, extending over a period of two or three weeks, subsequent to the settlement, September 26th?

A. Yes; I did.

Q. Who first told you, if you remember, that the interest of plaintiff in the Emma mine was not subject to any royalty under the lease?

A. Judkins.

Q. When did Mr. Rucker first tell you that it was not subject to the lease or the payment of royalty?

A. I do not remember that he ever told me so.

Q. Did he make any claim to that effect to you at that time as at the time of the settlement of September the 26th, 1884?

A. I think not.

Q. As a matter of fact, didn't you know that he did not make any such claim at that time?

A. Not as I remember of.

71 Q. What understanding had you up to the time of this conversation as to whether plaintiff's interest was subject to the payment of royalty under the lease?

(Objected to for the reason that it is incompetent.)

A. My understanding, both before and after that time, was that plaintiff's interest was subject to the lease.

Q. What lease do you refer to?

A. I refer to the lease on the Emma mine held under the name of C. E. Nevitt and owned by me, which was fixed and determined under the contract of September 26th, 1884.

Q. Who were the parties to that contract?

A. Wheeler, Nevitt, and myself.

Q. Who was present when that contract of September 26th was made; whom did you consult with reference to your interest as fixed by said contract?

A. I counseled with Judge Rucker.

Q. Did he act as your attorney in the making of that contract?

A. Yes, sir.

Q. When was this conversation held with Devereux in the court-room?

A. I have said within a week or ten days; I cannot fix it any nearer.

Q. Are you able to swear positively that Devereux said that the plaintiff's interest in the property was not subject to the payment of royalty, or did he say *or did he say* that the plaintiff claimed that his interest in the property was not subject to royalty?

A. I cannot swear positively which he said. It was a general conversation.

72 Q. Had Judkins previously to that time told you that Mr. Rucker claimed that his interest was not subject to the payment of royalty?

A. Yes, sir; claimed that to me, perhaps before this conversation with Mr. Devereux.

Q. At the time, then, that you had this conversation with Devereux you had already learned that the plaintiff claimed that his interest was not subject to the claim of royalty?

A. Yes, sir.

Q. Was that an inducement for you to give the option on to plaintiff which you did give for ten days?

A. I do not think it was.

Q. You say you had a heated argument in Wachtles' business house as to whether or not the plaintiff's interest was subject to the payment of royalty?

A. Yes, sir.

Q. What position did you take in the argument?

A. I took the position that it was.

Q. Was that before or after the option given to Mr. Rucker, the plaintiff, was given?

A. I cannot state positively, but I think it was before.

Q. Had any one, to your knowledge, approached you on behalf of

J. B. Wheeler for the purpose of buying your interest in the Emma mine previous to the time you went to New York to see him yourself?

A. They did not.

Recross-examination by Mr. RUCKER:

Q. What professional relation or employment existed between you and the plaintiff after the 26th day of September, 1884, and the time when you employed plaintiff to bring suit against Nevitt?

73 A. There was none between that time.

Recross-examination by Mr. DOWNING:

Q. How many suits have you had, if you know, with reference to the interests claimed or held by you in the Emma mine?

A. In connection with the Emma mine lease, and all, I have had at least four.

Q. Who has been your attorney in those suits—in all of those suits in which you have been represented by counsel?

A. Mr. Rucker has been my attorney in those suits, with the exception of the Nevitt and Webber suit, and there Mr. Bissel was associated with Mr. Rucker.

To the question propounded upon cross-examination of Henry Webber, "What understanding had you up to the time of this conversation as to whether plaintiff's interest was subject to the payment of royalty under the lease?" plaintiff objected, for the reason that said testimony was incompetent; which said objection was by the court overruled, and the witness answered as set forth in said deposition; to which ruling and decision of the court plaintiff then and there excepted.

Plaintiff then read to the jury a deed from C. A. Nevitt to Charles A. Judkins of the leasehold interest mentioned in the complaint, of date October 22, 1884, and next a deed from Judkins to Devereux, of same interest, under date of succeeding day, after showing that Devereux made the purchase from Judkins, paying therefor the sum of twenty-four thousand dollars for defendant without defendant's consent thereto before the purchase, and defendant ratified such act; and next a deed from Henry Webber to plaintiff,

74 duly acknowledged, and recorded on the day of the date thereof, of which the following is a copy:

This indenture, made the 28th day of April, in the year of our Lord one thousand eight hundred and eighty-four, between Henry Webber, of Pitkin county and State of California, party of the first part, and A. W. Rucker, of the county of Lake and State of Colorado, party of the second part, witnesseth: That the said party of the first part, for and in the consideration of the sum of $1.00, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell,

release, and forever quitclaim, unto the said party of the second part and his heirs and assigns an undivided one-twelfth interest in and to the Emma lode mining claim, situate on Aspen Mountain, adjoining the Vallejo lode mining claim, in Roaring Fork mining district, in Pitkin county, Colorado, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party
75 of the second part, his heirs and assigns, forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

HENRY WEBBER. [SEAL.]
—— ——. [SEAL.]

Signed and sealed and delivered in the presence of—
THOMAS A. RUCKER.

Plaintiff put in evidence stipulation that the value of one-twelfth of the ore settled for during the period of the Nevitt lease on the Emma mine up to the 21st of October, 1884, was two thousand two hundred and sixty-two dollars and thirty cents, and the value of the ore settled for between October 21 and the 20th of November, 1884, was two thousand six hundred and thirty dollars and sixty-six cents, due from defendant to plaintiff, if plaintiff's interest was not subject to the Nevitt lease; if said interest was subject to the Nevitt lease nothing was due on account of said ore to plaintiff.

It was also stipulated in open court that Devereux, the party mentioned in the testimony, was the agent for the transaction of all the business of defendant at Aspen, Colorado, over the period of all these negotiations.

Whereupon plaintiff rested his case.

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The defendant gave evidence tending to show that, in settlements with the plaintiff for his proportion of proceeds of Emma mine, he never ordered his part or portion of the royalty accruing under the Nevitt lease withheld; that he never heard of the plaintiff's claim of any money due him by reason of the fact that he had not received his full proportion due to him under the contract of September 6th, 1884, until after the first trial of the case, when he was informed that plaintiff had shifted his position, claiming under the contract instead of outside of it, up to which time he had always understood plaintiff's claim to be a twelfth interest, independent of said con-

tract, upon the ground that he was not a party to it; that W. B. Devereux had charge of defendant's business concerning the Emma mine at Aspen, and that he did not recollect having a conversation with plaintiff since the contract of September 26, 1884, was executed.

* * * * * * *

76 On Nov. 8th, 1884, defendant sent a telegram to W. B. Devereux, his agent, at Aspen, Colorado, from New York, saying: "What is due Webber on all Emma ore now at smelter? What is total value of ore now on dumps? Has any money been paid to Webber on September and October ore? Answer quick."

That he don't remember or cannot find any answer thereto; and after the purchase was arranged by him in New York he wrote Devereux a business letter, under date of November 11th, 1884, saying: "Webber came in on me very unexpectedly and stated that Judkins had been trying to buy his one-sixth interest in the Emma, and as he supposed that Judkins meant me, and as he did not want to deal with him, he concluded to come on and deal with me direct. After telegraphing you and thinking the matter over I came to the conclusion that it would be wise to buy him out, particularly if you considered the lease, that had so short a time to run, worth twenty-four thousand dollars. I therefore purchased this interest, to be paid as follows: Forty thousand dollars in four notes, two, four, six, and eight months, the notes to be put in escrow at bank until maturity. The one-sixth interest is in the name of his wife, Julia B. Webber. Please have a quitclaim deed drawn up at once and have it signed by his wife and duly recorded. The purchase includes all ore at smelter and all due her interest from smelting company and also at the mines. Please have Downing draw up a bill of sale for it and have Mrs. Webber sign it at same time she does the deed, and deposit both in bank. The notes I will send to 'Van,' and when deed is signed the notes can be dated by 'Van.' Yours of the 3d and 5th instant are received."

That on the 17th of November, 1884, he received a letter from Devereux, in which he stated: "Mr. Rucker claims a twelfth
77 in the whole mine, unencumbered;" and he also said: "Mr. Rucker claims that the one-fourth of Nevitt's 28 per cent. net (equal to 33 per cent. less 15 per cent. royalty), which comes out of the Webber interest, must be paid by Webber out of his one-sixth, and served notice on me to that effect."

In answer to this letter defendant wrote to Devereux, under date of Nov. 25, as follows: "If I understand, you said that Rucker demands a one-twelfth interest in the whole profits of the Emma regardless of the lease; as I understand it, the lease and royalty take precedence. After that the different interests are paid out of the balance. Please consult Downing about this. I think he will remember this was my understanding with Rucker. If I understand Rucker's claim, then it should certainly be disputed."

78 Also evidence tending to show that plaintiff represented Nevitt and Webber at the time of the drawing of the agreement of September 26, 1884, set forth in full in the last amended complaint, and that the terms and conditions of said compromise

were fully discussed by plaintiff as such attorney as well before as at the time thereof, and all its conditions and terms fully agreed upon and understood, the words "grantees or assigns" having been inserted in said agreement at the instance of J. M. Downing, defendant's attorney; that defendant signed it in the presence of Webber, Nevitt, and T. A. Rucker and plaintiff; that during none of this time was anything said by plaintiff about the manner in which his interest in said mine should be affected by said compromise which was made for the purpose of settling suits between defendant and said Webber and Nevitt concerning said property; that plaintiff did not dissent from said compromise and said nothing about his interest being exempted from the burden of the lease; that defendant never agreed with plaintiff that his interest should be so exempted, nor did he state so to T. A. Rucker; that he never authorized any one to make settlements with the plaintiff for his proportion of ores from the Emma mine independent of said lease; that the said lease was purchased for him from Nevett by Devereux on or about the 22nd day of October, 1884, for $24,000, and the same was assigned by Nevitt to Judkins and by Judkins to Devereux, which, though at the time unauthorized, was ratified by defendant; that since January 1st, 1885, Devereux has a power of attorney authorizing him to purchase or sell real estate for defendant but had no such authority prior to said time; that he repurchased the interest
79 conveyed to Webber by agreement of September 26, 1884, in November following, and purchased all and singular the interest of Julia Webber in proceeds as well as in mine, which will appear from deed of said Julia Webber to defendant annexed hereto; that plaintiff never had any connection with the purchase of said interest of Webber or his wife; never spoke to him on the subject; that he never authorized plaintiff or authorized any person to authorize plaintiff to assist in said purchase; first heard a rumor that plaintiff claimed a commission for defendant's said purchase several months thereafter; knew nothing of such claim being seriously made until service of summons, on September 3rd; only knew of Webber's intention to go to New York for the purpose of making said sale the day before his arrival there, when he heard through a telegram that he was on his way to see him; that he purchased said interest for $55,000, $15,000 cash, balance in four notes, 2, 4, 6, and 8 months, but doesn't remember the dates of payment.

Testimony of W. B. Devereux, for defendant, tended to prove that during the fall of the year 1884 and the winter of 1884 and '5, he was the representative of the defendant at Aspen; that he knew of the Emma mine and knew Judkins; knew when the controversy between the said defendant and Webber and Nevitt concerning the lease of the Emma mine was compromised. Knew that plaintiff was Webber's and Nevitt's attorney; that the
80 negotiations that he had concerning the matter in controversy were chiefly with Judkins; that he was not acting with any one in particular, but believed that if he accomplished anything Wheeler would make a purchase, intending to give him the oppor-

tunity, but witness was acting on his own responsibility without communicating with anybody; apprised Wheeler after there seemed some possibility of making a negotiation for the purchase of Webber's interest in the property; wired him that he was negotiating for a twelfth about the 22nd of October, 1884; never made any employment of plaintiff, save indirectly, through Judkins, who was a friend of Rucker. Judkins brought witness a memorandum after witness consented that Rucker should be employed, because Rucker signed an agreement written on a piece of paper; don't know where the agreement is, as Judkins took it at the time; agreement was practically if Rucker procured a bond for $40,000 and witness and Judkins subsequently purchased under the bond they would give him $10,000 after they got the money back, he taking half the net profits and witness' side half until ten thousand dollars was paid. If he did not get the bond for $40,000, then he should have five thousand. While Judkins was working to get the bond witness telegraphed to Wheeler that he was negotiating for one-twelfth, which was all witness was to have; Judkins to have the other. Wheeler answered not to buy Webber's interest, after which witness attempted to place it elsewhere, but did not inform plaintiff thereof, during which time Webber left Aspen. Witness did — know where he was or where he was going. After Wheeler's telegram witness consulted one Peter Finnerty in regard to the purchase, which was after he had heard that Webber had gone away. The only time witness
81 recollects ever seeing Rucker there after was near the door of the Emma office, on the sidewalk, which was before the sale of the Webber interest. After some talk witness asked him if he was making any progress with the bond. Plaintiff said, Yes; some, but not much. He said that he had a clinch on Webber which the latter did not dream of, which he would use if he did not get the bond pretty soon; that Webber thought he was going to have a sixth of the proceeds of the mine after the lease had taken its proportion, but that plaintiff had bought a twelfth in the mine; that he had not signed any compromise agreement, and was going to have a twelfth of the mine, which Webber had got to see that he received; that his interest was deeded to him six months before, and dates back of any lease; that Rucker enquired of witness if the latter did not think he was entitled to it, who said he did not know. If his statement was correct it might look that way, but it was a question of law, but that he would have a big fight on his hands, and demanded of plaintiff that he should give witness a notice to that effect, and witness did not want to be held responsible about the matter. Afterwards plaintiff gave him a notice, which is produced and reads as follows:

"To the Aspen Smelting Company, Aspen, Colorado:

You are hereby notified that I own one-twelfth interest in the Emma mine, and am entitled to one-twelfth of the net proceeds thereof.

Respectfully, A. W. RUCKER."

Witness was in charge of the Aspen Smelting Company at the time Webber sold to Wheeler, before any payments were due from the mine. On occasion of first payment to Rucker he wanted more money than was coming. Witness refused to pay amount demanded until the question of the twelfth was settled, but finally paid
82 the amount requested by plaintiff, with statements that it was an accommodation and not a recognition to the full extent of his claim. Afterwards there was a sum of money put in what was called a suspense account, which was paid over to Wheeler about the time of threatened litigation. The interest of Nevitt in the lease was purchased through Judkins, witness intending to take it himself if Wheeler did not want it, but afterwards Wheeler ratified the purchase and took the interest. In addition to the $24,000 paid for it Judkins received $2,500 for his services; never told Rucker or any one else that the lease interest was not subject to the lease or that he declined to settle with him because he had brought suit against the defendant for other parties; that in settlement with plaintiff the latter received his proportion or one-twelfth of the royalties accruing to owners under the lease. Whenever net profits were divided one-third was first deducted from the total amount of the profits; the balance was then divided, one-twelfth being credited to the plaintiff. From the third set apart from the Nevitt lease 15 per cent. was deducted for royalty, which was at the same time divided in the same manner, one-twelfth being credited to suspense account. Plaintiff never claimed that he was entitled to a full twelfth of the proceeds of the mine upon any other ground than that he was not a party to the contract of September 26th, 1884; never knew of a different claim until after the first trial of the case; do not recollect that plaintiff stated that he was not entitled to royalty, but did say that he wished his interest paid to him regardless of the lease. When the first payment was made to him he was distinctly told that it was paid on account and because of his urgent
83 needs and not in recognition of his claim in any respect; never estimated the amount of money due the Webber interest by deducting a sum due plaintiff; estimated the amount due Webber interest as one-sixth of two-thirds plus one-sixth of the royalties. The suspense account referred to is as follows: When dividends were paid the amount of money making up the difference between what plaintiff received and one-twelfth of the total dividend was charged under suspense account pending the settlement in dispute. The difference mentioned was not paid to Webber, and there was no division of profits made until after the Webber interest had been sold to defendant. Before any money was paid he left Aspen without saying where he was going. Witness knew nothing about it until a letter was received from Wheeler stating he had purchased the interest. The money in suspense account was paid to defendant through advice of counsel to avoid an attachment. Witness remembers making the stipulation as to amount set forth in plaintiff's testimony.

84 To further maintain the issues on the part of defendant J. M. Downing, Esq., gave evidence tending to show that plaintiff

dictated the major portion of the agreement of the 26th of September, 1884; that witness suggested the words "grantees and assigns" in said agreement. The fact of plaintiff's interest being subject to the lease was never questioned at the time said agreement was made.

And also C. B. Lott, who gave evidence that the words "grantees and assigns" were inserted at the instance of Mr. Downing, according to his recollection.

The defendant also offered in evidence a deed of Jerome B. Wheeler to Henry Webber, dated September 26, 1884, for a one-sixth of the Emma mine.

And also a deed from Julia Webber to Jerome B. Wheeler for said interest, of date November 22, 1884, conveying also one-sixth of the proceeds to said mine owned by the said Julia Webber.

Whereupon defendant rested.

Which was all the evidence adduced on the trial of said cause.

Upon the argument of said cause to the jury L. J. Laws, one of the attorneys of the plaintiff, stated to the jury, among other things, that the evidence showed there had been something in the neighborhood of half a million dollars taken out of said mine and the defendant had received the greatest portion thereof. He also stated that the evidence showed there was collusion between Webber and Wheeler, and that Webber's visit to New York was
85 brought about through the instrumentality of Wheeler and his agents for the purpose of defeating the plaintiff out of his commission, and also to defeat Judkins out of the interest he was to obtain in the mine if it had been purchased according to the agreement between plaintiff and Judkins and Devereux.

Upon the making of such statements counsel for defendant objected for the reason that there was no testimony showing such facts.

Whereupon the court called said Laws to order and stated to him in the presence of the jury that there was no evidence whatever that such statements were correct, and reprimanded said Laws for having made such statements to the jury.

The plaintiff prayed the court to instruct the jury as follows:

1. The court instructs the jury that if they believe from the evidence that the assignment of the lease of a portion of the Emma lode which was made by Abbey to Nevitt was made for the use and benefit of Henry Webber and was made prior to April 28th, 1884, when the plaintiff took his deed to one-twelfth of said lode from said Henry Webber, then from the date of such assignment to Nevitt the lesser estate, to wit, the leasehold right, was merged in Henry Webber, and the said Rucker took his interest free and clear of the incumbrance of the lease, and he is entitled to the amount of money named in the stipulation read in your hearing and interest at the rate of ten per cent. per year from the date of the commencement of the suit, which was August 24th, 1885.

2. The court is asked to instruct the jury that if they believe from the evidence that the lease of a portion of the lode, though made nominally to Nevitt, was in fact owned by Mr. Henry Web-
86 ber, and that the same Webber sold and conveyed a one-twelfth interest to the plaintiff after the making and delivery

of the lease, and if they also believe from the evidence that at the time of the execution of the deed from Webber to plaintiff it was mutually agreed between Webber and plaintiff that this one-twelfth should be exempt from the operation of said lease, then plaintiff is entitled to the proceeds of the one-twelfth, and upon these facts they should find for the plaintiff to the amount fixed by the stipulation of the parties read to the jury and interest at the rate of ten per cent. per year from August 24th, 1885, the date the suit was brought.

3. The court is asked to instruct the jury that under the pleadings of the defendant in this case the jury must find that the deed made by the defendant to Henry Webber of an undivided one-fourth of the Emma lode in accordance with the settlement of September 26th, 1884, enured and was intended to enure to the benefit of the plaintiff, and as there is no limit placed in the pleadings as to the extent to which it thus enured the jury must find it extended to the full extent the ownership of the estate could be affected by the acquisition of the leasehold interest therein subsequent to such deed, and in this view the plaintiff is entitled to take the whole proceeds of the one-twelfth free from the lease.

4. The court is asked to instruct the jury that if they believe from the evidence that, at the time of the making and delivery of the lease to Nevitt, Webber was the real owner thereof, then he owned the legal title to the one-twelfth, and the interest in the lease
87 being in Webber worked a merger or extinction of the lease to that extent between said Webber and his grantee, the plaintiff in this cause, whether any mention was or was not made of the lease at the time the deed to the one-twelfth was executed by Webber to plaintiff.

5. The court is asked to instruct the jury that if they believe from the evidence that in making the contract made between Devereux and Rucker as to purchasing the Webber interest was made for the benefit of Mr. Wheeler, and that Devereux was authorized to make such a contract, and that in procuring such purchase said Rucker was the procuring and direct cause by which the sale was effected, then plaintiff is entitled to recover the price agreed on, and that in determining whether said Devereux was or was not authorized to thus contract the jury must take into consideration all the facts and circumstances shown in evidence, and they are not bound by the evidence of the defendant on that point if from the facts and circumstances they believe that said Devereux was thus authorized.

6. The court is asked to instruct the jury if they believe from the evidence that the agreement testified to by Rucker, Judkins, and Devereux as to the plaintiff's compensation for the procuring the said Henry Webber to sell his wife's interest in the Emma lode was made with said Judkins and Devereux, and that at that time the said Devereux was authorized to purchase mining property for his principal and in his name, and that in making such agreement he was acting for his principal, said Wheeler, and that said Wheeler, anticipating such sale to Judkins and Devereux for him as aforesaid, whether he had or had not notice of the agreement,
88 prevented the completion of such agreement by said Judkins

and Devereux by purchasing the whole of Webber's interest for himself, and if they further believe that said Webber was induced to apply and sell said property to said Wheeler by reason of the efforts of the said plaintiff, then said plaintiff is entitled to recover such sum as had been agreed upon in case a purchase should be effected at one or other of the sums named in said agreement as the purchase price.

The court is asked to instruct the jury that by virtue of the deed from Webber to plaintiff he became entitled to one-twelfth of the proceeds of the mine from the date thereof, provided the evidence establishes that the leasehold estate was the property of said Webber; and, further, that even should they find that said leasehold estate was not the property of Webber, yet the plaintiff would be entitled to recover one-twelfth of the proceeds of said mine after the conveyance by defendant to Webber, said deed from Webber to plaintiff being made good by such deed from defendant to Webber, and the said Webber having by such conveyance from the defendant sufficient estate to satisfy the conveyance to plaintiff.

But the court refused to give such instructions, and to the ruling of the court in refusing to give such instructions, and each and every of them, to the jury the plaintiff, by his counsel, then and there duly excepted.

Whereupon the court, of its own motion, instructed the jury as follows:

The plaintiff states two causes of action, gentlemen: The first is for services rendered by him in purchasing the interest of Julia Webber in the Emma lode mining claim for the defendant.

89 Upon that cause of action, of course, his position is that he was employed by Mr. Wheeler, the defendant, to make this purchase for him, and the first matter for your consideration is whether there was any such employment. On that point I do not understand that there is much conflict of testimony—that is, Mr. Rucker, the plaintiff, agrees in his statements substantially with what is said by Mr. Judkins and Mr. Devereaux in respect to that matter. Mr. Judkins, having a scheme for purchasing this property, or a part, at least, upon his own account, hoping to get some one to share in the purchase with him, if he should be able to make it, opened negotiations with Mr. Webber through the plaintiff, and after these negotiations had been carried on for some time he went to Mr. Devereaux and laid the matter before him. Mr. Devereaux became interested in the matter and thought he would be willing to continue the negotiations or join with Mr. Judkins in the purchase if it could be made either for himself or on behalf of his principal, Mr. Wheeler. In so far he approved and agreed to adopt for himself or for Mr. Wheeler, perhaps, if the negotiations should be carried through on his part, what had taken place between Mr. Judkins and Mr. Rucker up to that time, and so far as the proceedings between Mr. Rucker and Mr. Judkins affect matters in issue in this suit there was a promise on the part of Mr. Judkins to pay Mr. Rucker $10,000 if this sale should be accomplished for the consideration of $40,000, and if a greater sum should be paid

for the property, then $5,000. Now, I have to say that on the cause of action, as stated here, in order to establish any right upon the part of the plaintiff to the commission for which he sues in making a sale, the proof must be of a sale made to the defendant and an agreement for a sale to
90 be made to the defendant—not a sale to Judkins and Devereux, not a sale to Judkins and the defendants, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join the payment of the commissions, and whoever would purchase under that agreement with Judkins would pay the commissions—that is to say, Judkins and Devereux, if they purchased, Devereux acting on his own behalf, Judkins and the defendant, if they purchased jointly, would pay it. If some other man was brought into the purchase—some one not named at that time or referred to in any way—then it would be that other man and Judkins who would pay the plaintiff the commission; furthermore it does not appear. In fact, the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other, and of course an agreement by Devereux on behalf of the defendant to purchase this property would not be binding on the defendant unless afterwards, with full knowledge of the situation and circumstances and of what had been done by Devereux in his behalf, he should ratify and confirm what had been done by Devereux. I do not see that this evidence proves, taking all that has been said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff.

I say now generally upon this branch of the case that it must appear to you from the evidence "that there was an agreement between the plaintiff and defendant, Mr. Rucker and Mr. Wheeler, to the effect that Mr. Rucker was to secure this property for him, and that he was to pay him for that service. The agreement which appears to be stated by Judkins and by Devereux is not of
91 that 'character'—that is, that was an agreement that Judkins should purchase with somebody else, and of course Judkins would be chargeable with the commission upon that if it was carried out. If you can find anything in the evidence to support the conclusion that the defendant made an agreement with plaintiff to pay this commission, and that the property was afterwards purchased by him in pursuance of that agreement, then the plaintiff is entitled to recover; otherwise he is not entitled to recover. So much for that cause of action."

To which charge and instruction of the jury the plaintiff then and there duly excepted.

We now come to the second cause of action, which is not so easily understood: "It seems that in November, 1883, Mr. Fisk, who claimed to be the owner of $\frac{48}{60}$ths of this mine, leased to Mr. Abbey (who claimed to own the other $\frac{12}{60}$ths) the $\frac{48}{60}$ths which he, Fisk, owned, and Mr. Abbey assigned to Nevitt $\frac{16}{60}$ths of his interest in the $\frac{48}{60}$ths which he had received from Fisk. Nevitt commenced work under that assignment. He was to do something towards develop-

ing the property in consideration of this assignment to him, and in some way, which is not explained in the evidence fully, though it has been explained by counsel, he came to claim a right to carry on the mine during the term of this lease entirely—that is, as to all the interests involved in it. I believe this claim was asserted by him in 1884. It is said, and it appears to be conceded on both sides, that Nevitt represented Mr. Webber in this lease, and that whatever he was doing upon this claim was for the benefit of Mr. Webber. Mr. Webber, who claimed to own one-third or $\frac{2}{6}\frac{0}{0}$ths of the mine in that month, April, 1884, brought a suit to
92 recover this $\frac{2}{6}\frac{0}{0}$ths. He seems to have held the original title to this $\frac{2}{6}\frac{0}{0}$ths. Fisk, in the preceding year, had instituted proceedings against him under section 2324 of the Revised Statutes to acquire his interest from failure to do the annual work for 1882, so that a controversy had arisen between him and Fisk, and, of course, between those who should claim under Fisk under this lease with Abbey and Nevitt in respect to this one-third interest in the mine. He brought this suit and employed the plaintiff here as his counsel in it. On the 28th of April, 1884, he conveyed to the plaintiff one-fourth of his interest, which was $\frac{5}{6}\frac{}{0}$ths or $\frac{1}{1}\frac{}{2}$th, assuming that he owned $\frac{2}{6}\frac{0}{0}$ths of the mine, one-twelfth of the whole mine to pay him for his services in this suit. Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed or quitclaim of $\frac{5}{6}\frac{}{0}$ths in the mine was given. On the 26th of September following, that same year, Wheeler, Nevitt, and Webber made the agreement which has been read here several times, by which they settled this controversy which had arisen between Webber and the others in respect to this $\frac{2}{6}\frac{0}{0}$ths, and assumed to settle all of the matters pending between them in respect to this property. In that agreement it was stated that Mr. Webber was the owner of one-fourth; that was $\frac{5}{6}\frac{}{0}$ths less than he had claimed in the first instance; one-fourth would be $\frac{1}{6}\frac{5}{0}$ths. They referred to this suit, which had been brought in the April preceding by Mr. Rucker, the plaintiff here, in behalf of Mr. Webber: "Whereas the said party of the first part (that is Wheeler) is the owner of certain interests in the Emma mine, situated in Pitkin county, State of Colorado, and a suit is now pending in the district court of said county in behalf of said Webber
93 against said party of the first part and others for a one-third interest in said mine;" and then reference is made to a suit brought by Wheeler against Nevitt, involving the title to the mine in some way, and they referred to the lease: "And whereas said parties being desirous of compromising and settling said actions, it is agreed, in consideration of the premises, the said first party will, upon the ensealing of these presents, make, execute, and deliver a sufficient deed of quitclaim to said Webber, his grantees or assigns, for an undivided one-fourth interest in said mine, and said Webber, on the receipt of said deed, agrees to release and waive, and does hereby release and waive, to said party of the first part all claims which he may have to any further or other interest in said property;" so that upon that it must be assumed that at the time of the making of the

deed, the 28th of April, 1884, to the plaintiff in this suit Mr. Webber owned a one-fourth interest in the property, or $\frac{1}{6}\frac{5}{0}$ths, and of that he conveyed $\frac{5}{6}\frac{}{0}$ths to the plaintiff. Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to the plaintiff in respect to the lease which was then subsisting, or, at all events, which was being carried on by Nevitt at that time, of this property, and subsequently, and which was perpetuated and recognized by this agreement of the 26th of September, 1884, the question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to take a $\frac{5}{6}\frac{}{0}$ths or a one-twelfth of the proceeds of the property under the lease—or whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration. In this agreement the
94 interests of the several parties in the proceeds of this lease are expressed—that is, the amount which Wheeler should have, the amount which Webber should have, and the amount that Nevitt should have. In this instance, at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only an agent of Webber in it, the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in the agreement with respect to the lease: "And the said second party (that is, Nevitt) hereby releases and waives to said first party all right and title as to said lease, save and except a one-third interest therein, and at the end of said term releases and surrenders the whole thereof and possession thereunder peaceably to the owners of said property, their grantees or assigns." It is further agreed "that the proceeds of the ore now on hand, after the payment of the cost of production, and after payment of the cost of hauling and treatment, shall be divided as follows: Said party of the second part (Nevitt) to receive one-third, less a royalty of 15 per cent. of said one-third interest, according to the terms set forth in said lease, and said party of the first part to receive three-fourths of the remaining two thirds;" that would be $\frac{3}{6}\frac{0}{0}$ths, or one-half; "and the said Webber (Webber being recognized distinctly from Nevitt in this agreement), his grantees or assignees, one fourth of the said remaining two-thirds," which would be $\frac{1}{6}\frac{0}{0}$ths, or one-sixth of the whole, and during the remainder of the term of said lease, namely, up to and inclusive of the 20th of November, 1884, the proceeds of the mine to be divided in the same manner and in the same proportions as aforesaid, such
95 division also to apply to and include the said royalty to be paid by said second party as aforesaid.

Now, the position of the plaintiff is that he comes in under the designation of a grantee or assignee of Webber for one-half of the amount reserved to Webber by this agreement—that is, $\frac{5}{6}\frac{}{0}$ths; this agreement reserves to Webber $\frac{1}{6}\frac{0}{0}$ths; and the position of the plaintiff is that he must be regarded as an assignee and grantee of Webber in virtue of his deed of the preceding April for half of that amount which was reserved to Webber. He has brought this suit to recover that. Now, as I said before, in the deed there is noth-

ing about that, and the question is what was the intention of the parties at the time this deed was made? The plaintiff testifies that it was *their* intention that he should have the interest accruing under this lease as it went along, and was not to be postponed to the lease. I understand Mr. Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Mr. Webber's testimony, whether he has denied it or not. Mr. Webber could, if he chose to, by the terms of the agreement, reserve this entire interest to himself—that is, all that was accruing under the lease—if it was his intention to keep it to himself, and there was no agreement of the parties in respect to it; the deed constitutes no agreement. He could reserve it to himself, and if he did reserve it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to the plaintiff, then it would go to Webber; and under these circumstances it remained in him up to the time that he made the sale to the defendant in this case. After the agreement of September 26th, and some time in October, Nevitt sold, as you remember, through the negotiations of Mr. Judkins, to Mr. Devereux or to the defendant directly—I don't remember much about that transac-
96 tion—and subsequently Mrs. Webber, in a conveyance which she made to the defendant, assumed to convey all right and interest accruing to her under the lease. Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of it, $\frac{1}{1\frac{1}{2}}$th, $\frac{5}{60}$ths of the whole amount—and if Nevitt was taking the whole proceeds of the mine, and I believe he was—at least it seems that he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine, nothing that could be divided amongst them—among the several parties—until that time, and nothing was in fact divided until after this agreement of the 26th of September was made, so that the question must be whether there was an agreement between the plaintiff and defendant or between the plaintiff and Webber that he should be entitled to these proceeds from the time of the conveyance to him; that is a question of fact for your consideration. If you find that there was such an agreement; that the parties understood and intended that Mr. Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from and after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties. They have agreed upon the amount. In the absence of such an agreement, then he is not entitled to recover.

97 To that portion of the foregoing charge of the court upon the first cause of action in the complaint as follows: "In order to establish any right upon the part of the plaintiff to the commission for which he sues, in making a sale the proof must be of a sale

made to the defendant and an agreement for a sale to be made to the defendant, not a sale to Judkins and Devereux; not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission and whoever would purchase under that agreement with Judkins would pay the commission—that is to say, Judkins and Devereux, if they purchased, Devereux acting on his own behalf, Judkins and the defendant, if they purchased jointly, would pay. If some other man was brought into the purchase, some one not named at that time or referred to in any manner, then it would be that other man and Judkins who would pay the plaintiff the commission."

Plaintiff, at the time of the giving thereof, excepted to each and every proposition contained therein.

And also to that portion of the charge upon the same cause of action as follows: "Furthermore it does not appear—in fact, the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other," plaintiff at the time duly excepted.

And also to that portion of the charge aforesaid as follows: "I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to pur-
98 chase this property through the plaintiff," the plaintiff at the time duly excepted.

And also to that portion of the charge aforesaid as follows: "That it must appear to you from the evidence that there was an agreement between the plaintiff and defendant, Rucker and Wheeler, to the effect that Rucker was to secure this property for him and that he was to pay him for his services. The agreement which appears to be stated by Judkins and Devereux is not of that character," the plaintiff then and there duly excepted.

To that portion of the charge upon the second cause of action in the complaint as follows: "Nevitt commenced work under that assignment. He was to do something towards developing the property in consideration of this assignment to him, and in some way which is not explained in the evidence fully, though it has been explained by counsel, he came to claim a right to carry on the mine during the term of this lease entirely—that is, as to all the interests involved in it. I believe this claim was asserted by him in 1884," plaintiff then and there duly excepted.

And to that portion of the charge aforesaid as follows: "Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed of quitclaim to five-sixtieths in the mine was given," plaintiff then and there duly excepted.

And to that portion of the charge aforesaid as follows: "Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to plaintiff in respect to the lease which was then subsisting, or at all events which was being carried on by Nevitt at that time on this
99 property and subsequently, and which was perpetuated and recognized by this agreement of the 26th of Sept., 1884, the

question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to the five-sixtieths or one-twelfth of the proceeds of the property under the lease, or whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration," the plaintiff then and there excepted.

Also to that portion of the charge aforesaid as follows: "In this instance, at least, and for some reason which is not explained—if it be true that Nevitt's position in the transaction was that of Webber, that he was only the agent of Webber in it—the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in that agreement with respect to the lease," plaintiff then and there duly excepted.

Also to that portion of the charge aforesaid as follows: "Now, as I stated before, in the deed there is nothing about that, and the question is, What was the intention of the parties at the time this deed was made? The plaintiff testifies that it was their intention that he should have the interest accruing under this lease as it went along, and was not to be postponed to the lease. I understand Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Webber's testimony—whether he has denied it or not. Webber could, if he chose to, by the terms of the agreement, have reserved this entire interest to himself—that is, all that was accruing under the lease. If it was his intention to keep it to himself—and there is no other agreement of the
100 parties in respect to it; the deed constitutes no agreement—he could reserve it to himself; and if he had reserved it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to plaintiff, then it would go to Webber, and under those circumstances it remained in him at the time he made the sale to defendant in this case," the plaintiff to all and each proposition therein stated then and there excepted.

Also to that portion of the charge aforesaid as follows: "Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of one-twelfth or five-sixtieths of the whole amount. If Nevitt was taking the whole proceeds of the mine—I believe he was; at least it seems he did so, or assumed the right to do so, after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine; nothing that could be divided among them—among the several parties—until that time, and nothing was in fact divided until after this agreement of the 26th of September was made, so that the question must be whether there was an agreement between the plaintiff and defendant, or between plaintiff and Webber, that he should be entitled to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration," plaintiff

to each and every proposition therein stated then and there duly excepted.

Also to that portion of the charge aforesaid as follows: "If you find that there was such an agreement that the parties understood and intended that Rucker should be entitled to whatever
101 should arise under the lease according to the proposition and interest conveyed to him by this deed from and after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties," and to each and every proposition therein contained plaintiff then and there duly excepted.

Also to the following portion of the charge aforesaid: "In the absence of such an agreement, then he is not entitled to recover," plaintiff then and there excepted.

To which charge of the court and each and every proposition therein contained the plaintiff then and there duly excepted.

And thereupon the jury returned a verdict against the plaintiff and in favor of the defendant as follows: "We, the jury, find the issues herein in favor of the defendant, and upon the counter-claim plead in the answer of defendant we find in favor of the defendant for the sum of three hundred and fifteen dollars."

Whereupon the plaintiff, by his counsel, on the 15th day of November, 1886, filed his motion for a new trial in words and figures following:

Now comes the plaintiff and moves the court to set aside the verdict rendered and to grant a new trial in this cause for the reasons—

1st. The court refused to admit proper evidence offered by the plaintiff on the trial of said cause.

2d. The court admitted on the trial improper evidence on the part of defendant.

102 3d. On account of surprises to the plaintiff which ordinary precaution could not have guarded against.

4th. Because the court refused to construe the contract between Henry Webber and the plaintiff, and submitted the same to the jury.

5th. Because of the misconduct of the counsel for defendant in the trial of said cause and in his argument to the jury.

6th. For errors committed by the court during the trial of said cause and argument of counsel.

7th. On account of newly-discovered evidence since the trial thereof.

8th. For errors committed by the court in its refusal to instruct the jury as prayed for by the plaintiff.

9th. For errors committed by the court in its instructions and charges to the tury.

10th. That the verdict is against the law and the evidence.

11th. And for other & sufficient reasons.

(S'g'd) TELLER, LAWS & RUCKER, *For Pl'ff.*

Afterwards and on, to wit, the — day of ——, 1887, after the verdict of the jury and after motion for new trial herein filed, the plaintiff filed in said court affidavits in support of his motion for a new trial.

Plaintiff's own affidavit tended to show that at the time of the taking of the deposition of Henry Webber before the trial of said cause he did not know that the court considered the ques-
103 tion whether there was an agreement between Henry Webber and plaintiff to the effect that at the time the said Webber deeded to plaintiff Webber understood that his (plaintiff's) interest was not subject to the burden of the Webber lease held in Nevitt's name; nor did he know what the said Webber would testify concerning the same; nor had he ever had any conversation with Thomas A. Rucker or C. E. Nevitt concerning what they knew relative to said understanding and that such testimony as is given by the said Webber, Rucker, and Nevitt came to his knowledge after said trial.

Also the affidavit of Henry Webber, which tended to show that after the agreement of the 26th of September, 1884, was made he considered that the plaintiff was entitled to his one-twelfth of the net proceeds of said mine; that he could not remember that there was any agreement made between plaintiff and himself at the time he made his deed to the plaintiff, in April, 1884.

Also the affidavit of Thomas A. Rucker, which tended to show that he negotiated in some part with Webber for plaintiff's interest in the Emma mine, and that it was distinctly understood between affiant and Webber that plaintiff was to have his interest free and clear of all incumbrance of said lease; that as attorney for said Webber he negotiated with Charles F. Abbey for the lease upon sixteen-sixtieths of said mine, and that the said lease was owned by said Webber; that Nevitt contributed in no way to its obtainment or to the operations thereunder thereafter.

Also the affidavit of C. E. Nevitt, which tended to show that both himself and Webber always regarded the plaintiff's interest as exempted from the burden of the lease which stood in his name upon the sixteen-sixtieths in said mine, and that he never
104 heard any claim to the contrary until since the trial of this cause.

But the court denied the motion for a new trial and gave judgment on the verdict against the plaintiff upon the cause of action set forth in the complaint and sustained said motion as to the counterclaim and the verdict tendered thereon.

To which ruling and decision of the court in denying said motion of plaintiff and rendering judgment against him upon the causes of action stated by plaintiff in his complaint plaintiff, by his counsel, then and there excepted, and was given sixty days in which to file his bill of exceptions herein, pending which time the following stipulation was made between counsel in said cause:

Stipulation.

In the United States Circuit Court, District of Colorado.

ATTERSON W. RUCKER *vs.* JEROME B. WHEELER.

It is hereby stipulated and agreed by and between the above-named plaintiff and defendant that upon the filing of the record and bill of exceptions in this cause in the Supreme Court of the United States the said cause shall stand submitted under the 20th rule of said Court at its ensuing October term.

Dated 3, 4, 1887.

(Signed) A. W. RUCKER, *In Pro. Per.*
" THOMAS M. PATTERSON,
105–110 (Signed) CHARLES S. THOMAS,
Att'ys for Def't.

And forasmuch as the record in this cause does not contain the proceedings of said trial, as hereinbefore set forth, the plaintiff files this his bill of exceptions and asks that the same may be signed and sealed and made a part of the record thereof, which is accordingly done this 18th day of April, A. D. 1887.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) 1794. United States of America. In the circuit court, district of Colorado. A. W. Rucker *v.* J. B. Wheeler. Bill of exceptions. Filed Apr. 18, 1887. (Signed) Edward E. Bishop, clerk.

* * * * * * *

111 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorada, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein Atterson W. Rucker was plaintiff and Jerome B. Wheeler was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 24th day of June, A. D. 1887.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By, F. W. TUPPER, *Deputy Clerk.*

112 *Assignment of Errors.*

In the Supreme Court of the United States.

ATTERSON W. RUCKER, Plaintiff in Error,

vs.

JEROME B. WHEELER, Defendant in Error.

And now, before the justices of the Supreme Court of the United States, comes the said Atterson W. Rucker, plaintiff in error, and says that in the record of proceedings in said cause there is manifest error in this, to wit:

First. That the court erred in admitting the testimony of Henry Webber upon cross-examination in answer to the question, "What understanding had you up to the time of this conversation as to whether plaintiff's interest was subject to payment of royalty under the lease?" to which question witness answered as follows: "My understanding, both before and after that time, was that plaintiff's interest was subject to the lease." (Original record, pp. 70–'1.)

Second. In the statement made by the court to the jury during the argument of L. J. Laws, attorney for plaintiff, and the reproof administered by the court to said Laws during said argument in the presence of the jury. (Pp. 84–85.)

Third. That the court refused to charge the jury as prayed by the plaintiff in error in the first, second, third, fourth, fifth, and sixth instructions asked by plaintiff in error. Pp. 85–86.

Fourth. The court refused to charge the jury as prayed for by plaintiff in error in language as follows: "The court is asked to instruct the jury that by virtue of the deed from Webber to plaintiff he became entitled to one-twelfth of the proceeds of the mine from the date thereof, provided the evidence establishes that
113 the leasehold estate was the property of Webber; and, further, that even should they find that said leasehold estate was not the property of Webber, yet the plaintiff would be entitled to recover one-twelfth of the proceeds of said mine after the conveyance from defendant to Webber, said deed from Webber to plaintiff being made good by such deed from defendant to Webber, and the said Webber having by such conveyance from the defendant sufficient estate to satisfy the conveyance to plaintiff. (P. 88.)

Fifth. That the court, in its instructions to the jury, charged in language as follows: "The plaintiff states two causes of action, gentlemen. The first is for services rendered by him in purchasing the interest of Julia Webber in the Emma lode mining claim for the defendant. Upon that cause of action his position is that he was employed by Mr. Wheeler, the defendant, to make this purchase for him, and the first matter for your consideration is whether there was any such employment. On that point I do not understand there is much conflict of testimony—that is, Mr. Rucker, the plaintiff, agrees in his statement substantially with what is said by Mr. Jud-

kins and Mr. Devereux in respect to that matter. Mr. Judkins, having a scheme for purchasing this property, or a part at least, upon his own account, hoping to get some one to share in the purchase with him, if he should be able to make it, opened negotiations with Mr. Webber through the plaintiff, and after these negotiations had been carried on for some time he went to Mr. Devereux and laid the matter before him. Mr. Devereux became interested in the matter, and thought he would be willing to continue the negotiations or join with Mr. Judkins in the purchase, if it could be made, either for himself or on behalf of his principal, Mr. Wheeler. In so far he approved and agreed to adopt for himself or for Mr. Wheeler, perhaps, if the negotiations should be carried through on his part, what had taken place between Mr. Judkins and
114 Mr. Rucker up to that time, and so far as the proceedings between Mr. Rucker and Mr. Judkins affect matters in issue in this suit, there was a promise on the part of Mr. Judkins to pay Mr. Rucker ten thousand dollars if this sale should be accomplished for the consideration of forty thousand dollars, and if a greater sum should be paid for the property, then five thousand dollars. Now, I have to say that on the cause of action as stated here, in order to establish any right on the part of the plaintiff to the commission for which he sues in making a sale the proof must be of a sale to the defendant and an agreement for a sale to be made to the defendant and not a sale to Judkins and Devereux, not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission, and whoever would purchase under that agreement with Judkins would pay the commission—that is to say, Judkins and Devereux, if they purchase, Devereux acting on his own behalf, Judkins and the defendant, if they purchased jointly, would pay it. If some other man was brought into the purchase—some one not named at that time or referred to in any way—then it would be that other man and Judkins who would pay the plaintiff the commission. Furthermore, it does not appear—in fact the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other, and, of course, an agreement by Devereux on behalf of the defendant to purchase this property would not be binding on the defendant unless afterwards, with full knowledge of the situation and circumstances and of what had been done by Devereux in his behalf, he should ratify and confirm what has been
114½ done by Dervereux. I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff. I say now generally upon this branch of the case that it must appear to you from the evidence that there was an agreement between the plaintiff and defendant, Mr. Rucker and Mr. Wheeler, to the effect that Mr. Rucker was to secure this property for him and that he was to pay him for that service. The agreement, which appears to be stated by Judkins and by Devereux, is not of that character—that is, that was an agreement that Judkins should pur-

chase with somebody else, and of course Judkins would be chargeable with the commission if it was carried out. If you can find anything in the evidence to support the conclusion that the defendant made an agreement with plaintiff to pay this commission, and that the property was afterwards purchased by him in pursuance of that agreement, then the plaintiff is entitled to recover; otherwise, he is not entitled to recover. So much for that cause of action.

Sixth. That the court in its instructions to the jury charged in language as follows: "We now come to the second cause of action, which is not so easily understood. It seems that in November, 1883, Mr. Fisk, who claimed to be the owner of $\frac{48}{60}$ths of this mine, leased to Mr. Abbey (who claimed to own the other $\frac{12}{60}$ths), the $\frac{48}{60}$ths which he, Fisk, owned, and Mr. Abbey assigned to Nevitt $\frac{16}{60}$ths of his interest in the $\frac{48}{60}$ths which he had received from Fisk. Nevitt commenced work under that assignment. He was to do something towards developing the property in consideration of this assignment to him, and in some way which is not explained in the evidence fully, though it has been explained by counsel,
he came to claim a right to carry on the mine during the
115 term of this lease entirely—that is, as to all the interest involved in it. I believe this claim was asserted by him in 1884. It is said, and it appears to be conceded on both sides, that Nevitt represented Mr. Webber in this lease, and that whatever he was doing upon this claim was for the benefit of Mr. Webber. Mr. Webber, who claimed to own one-third or $\frac{20}{60}$ths of the mine, in that month, April, 1884, brought a suit to recover this $\frac{20}{60}$ths. He seemed to have held the original title to this $\frac{20}{60}$ths. Fisk, in the preceding year, had instituted proceedings against him under section 2324 of the Revised Statutes to acquire his interest from failure to do the annual work for 1882, so that a controversy had risen between him and Fisk, and, of course, between those who should claim under Fisk under this lease with Abbey and Nevitt, in respect to this one-third interest in the mine. He brought this suit and employed the plaintiff here as his counsel in it. On the 28th of April, 1884, he conveyed to the plaintiff one-fourth of his interest, which was $\frac{5}{60}$ths or $\frac{1}{12}$th, assuming that he owned $\frac{20}{60}$ths of the mine, $\frac{1}{12}$th of the whole mine, to pay him for his services in this suit. Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed or quitclaim of $\frac{5}{60}$ths in the mine was given. On the 26th of September following, that same year, Wheeler, Nevitt, and Webber made the agreement which has been read here several times, by which they settled this controversy which had arisen between Webber and the others in respect to this $\frac{20}{60}$ths, and assumed to settle all of the matters pending between them in respect to this property. In that agreement it was
stated that Mr. Webber was the owner of one-fourth;
116 that was $\frac{5}{60}$ths less than he had claimed in the first instance;
one-fourth would be $\frac{15}{60}$ths. They referred to this suit which had been brought in the April preceding by Mr. Rucker, the plaintiff here, in behalf of Mr. Webber: "Whereas the said party of the first part (that is, Wheeler) is the owner of certain interests in

the Emma mine, situated in Pitkin county, State of Colorado, and a suit is now pending in the district court of said county in behalf of said Webber against said party of the first part and others for a one-third interest in said mine," and then reference is made to a suit brought by Wheeler against Nevitt, involving the title to the mine in some way, and they referred to the lease: "And whereas said parties being desirous of compromising and settling said actions, it is agreed, in consideration of the premises, the said first party will upon the ensealing of these presents make, execute, and deliver a sufficient deed of quitclaim to said Webber, his grantees or assigns, for an undivided one-fourth interest in said mine, and said Webber, on the receipt of said deed, agrees to release and waive, and does hereby release and waive, to said party of the first part all claims which he may have to any further or other interest in said property." So that upon that it must be assumed that at the time of the making of the deed, the 28th of April, 1884, to the plaintiff in this suit Mr. Webber owned a one-fourth interest in the property, or $\frac{15}{60}$ths, and of that he conveyed $\frac{5}{60}$ths to the plaintiff. Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to the plaintiff in respect to the lease which was then subsisting, or at all events which was being carried on by Nevitt at that time, of this property, and subsequently, and which was perpetuated and recognized by this agreement of the 26th of September, 1884, the question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to take a $\frac{5}{60}$th or a one-twelfth of the proceeds of the property under the lease, or whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration. In this agreement the interests of the several parties in the proceeds of this lease are expressed—that is, the amount which Wheeler should have, the amount which Webber should have, and the amount which Nevitt should have. In this instance at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only an agent for Webber in it, the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in the agreement with respect to the lease. "And the said second party (that is, Nevitt) hereby releases and waives to said first party all right and title as to said lease save and except a one-third interest therein, and at the end of said term releases and surrenders the whole thereof and possession thereunder peaceably to the owners of said property, their grantees or assigns." It is further agreed "that the proceeds of the ore now on hand, after payment of the cost of production, and after payment of the cost of hauling and treatment, shall be divided as follows: Said party of the second part (Nevitt) to receive one-third, less a royalty of fifteen per cent. of said one-third interest, according to the terms set forth in said lease, and said party of the first part to receive three-fourths of the remaining two-thirds;" that would be $\frac{30}{60}$ths, or one-half. "And the said Webber (Webber being recognized distinctly from Nevitt in this agreement), his grantees or as-

signs, one-fourth of the said remaining two-thirds," which would be $\frac{1}{6}\frac{0}{0}$ths or one-sixth of the whole, and during the remainder of the terms of said lease, namely, up to and inclusive of the 20th of November, 1884, the proceeds of the mine to be divided
in the same manner and in the same proportions as
117 aforesaid, such division also to apply to and include the
said royalty to be paid by said second party as aforesaid. Now, the position of the plaintiff is that he comes in under the designation of a grantee or assignee of Webber for one-half of the amount reserved to Webber by this agreement—that is, $\frac{5}{6}\frac{0}{0}$ths; this agreement reserves to Webber $\frac{1}{6}\frac{0}{0}$ths; and the position of the plaintiff is that he must be regarded as an assignee and grantee of Webber in virtue of his deed of the preceding April for half of that amount which was reserved to Webber. He has brought this suit to recover that. Now, as I said before, in the deed there is nothing about that, and the question is, What was the intention of the parties at the time this deed was made? The plaintiff testifies that it was their intention that he should have the interest accruing under this lease as it went along and was not to be postponed to the lease. I understand Mr. Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Mr. Webber's testimony—whether he has denied it or not. Mr. Webber could, if he chose to, by the terms of the agreement, reserve this entire interest to himself—that is, all that was accruing under the lease, if it was his intention to keep it to himself, and there was no agreement of the parties in respect to it—the deed constitutes no agreement. He could reserve it to himself, and if he did reserve it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to the plaintiff, then it would go to Webber, and under these circumstances it remained in him up to the time he made the sale to the defendant in this case. After the agreement of September 26th and some time in October Nevitt sold, as you remember, through the negotiations of Judkins, to Mr. Devereux or to the defendant directly—I don't remember much about that transaction—and subsequently Mrs. Webber, in a conveyance which she made to the defendant, assumed to convey all right and interest accruing to her under the lease. Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of it, $\frac{1}{12}$th, $\frac{5}{6}\frac{0}{0}$ths of the whole amount; and if Nevitt was taking the whole of the proceeds of the mine—I believe he was, at least it seems that he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine, nothing that could be divided amongst them—among the several parties, until that time, and nothing was in fact divided until after this agreement of the 26th of September was made; so that the question must be whether there was an agreement between the plaintiff and defendant or between plaintiff and Webber that he should be entitled

to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration. If you find that there was such an agreement, that the parties understood and intended that Mr. Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from and after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover
118 the sum specified in this stipulation between the parties. They have agreed upon the amount. In the absence of such an agreement he is not entitled to recover.

Seventh. The court, in its instructions to the jury upon the first cause of action, charged in language as follows: "In order to establish any right upon the part of plaintiff to the commission for which he sues in making the sale, the proof must be of a sale made to the defendant and an agreement for a sale to be made to the defendant; not a sale to Judkins and Devereux; not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission, and whoever would purchase under that agreement would pay the commission—that is to say, Judkins and Devereux, if they purchased, Devereux acting on his own behalf, Judkins and the defendant, if they purchased jointly, would pay. If some other man was brought into the purchase—some one not named at that time or referred to in any manner—then it would be that other man and Judkins who would pay the commission."

119 Eighth. That the court in its instructions to the jury charged in language as follows: Furthermore, it does not appear, in fact, the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other. * * * I do not see that his evidence proves, taking all that is said about it by these witnesses, a contract on behalf of defendant to purchase this property through the plaintiff. * * * That it must appear to you from the evidence that there was an agreement between plaintiff and defendant Rucker and Wheeler to the effect that Rucker was to secure this property for him, and that he was to pay him for his services. The agreement which appears to be stated by Judkins and Devereux is not of that character.

Ninth. That the court in its instructions to the jury upon the second cause of action charged in language as follows: Nevitt commenced work under that assignment. He was to do something towards developing the property in consideration of this assignment to him, and in some way, which is not explained in the evidence fully, though it has been explained by counsel, he came to claim a right to carry on the mine during the term of this lease entirely—that is, as to all the interests involved in it. I believe this claim was asserted by him in 1884. * * * Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed of quitclaim for $\frac{5}{6}\frac{5}{0}$ths in the

mine was given. * * * Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to plaintiff in respect to the lease which was then subsisting, or at all events which was being carried on by Nevitt at that time on this property
120 and subsequently, and which was perpetuated and recognized by this agreement of the 26th of September, 1884, the question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to the $\frac{5}{60}$ths or $\frac{1}{12}$ of the proceeds of the property under the lease or whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration. * * * In this instance, at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only the agent of Webber in it, the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in that agreement with respect to the lease. * * * Now, as I stated before, in the deed there is nothing about that, and the question is, What was the intention of the parties at the time this deed was made? The plaintiff testifies that it was their intention that he should have the interest accruing under this lease as it went along, and was not to be postponed to the lease. I understand Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Webber's testimony—whether he has denied it or not. Webber could, if he chose to, by the terms of the agreement, have reserved this entire interest to himself—that is, all that was accruing under the lease. If it was the intention to keep it to himself, and there is no agreement of the parties in respect to it—the deed constitutes no agreement—he could reserve it to himself; and if he had reserved it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to plaintiff, then it would go to Webber, and under those circumstances it remained in him at the time he made the sale to defendant in this case. * * * Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become affected at once upon the execution of the deed and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of $\frac{1}{12}$th or $\frac{5}{60}$ths of the whole amount. If Nevitt was taking the whole proceeds of the mine—I believe he was; at least it seems he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine, nothing that could be divided among them—among the several parties—until that time, and nothing was, in fact, divided until after this agreement of the 26th of September was made; so that the question must be whether there was an agreement between plaintiff and defendant or between plaintiff and Webber that he should be entitled to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration. * * * If you find there was such an agreement, that

the parties understood and intended that Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from and after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties. * * * In the absence of such an agreement, then he is not entitled to recover.

121 Ninth. That the court erred in overruling the motion for a new trial in the cause.

WILLARD TELLER,
Att'y for Pl'ff in Error.
ATTERSON W. RUCKER,
In Pro. Per.

122 [Endorsed:] In the Supreme Court of the United States. Atterson W. Rucker, plaintiff in error, *v.* Jerome B. Wheeler, defendant in error. Atterson W. Rucker, *in pro. per.*, & Willard Teller, att'ys for pl'ff in error.

123 *Stipulation.*

In the Supreme Court of the United States.

ATTERSON W. RUCKER, Plaintiff in Error,

vs.

JEROME B. WHEELER, Defendant in Error.

It is hereby stipulated by and between the parties to this action, for the purpose of availing themselves of rule No. — of this Court, that it is unnecessary to print the documents set forth in the transcript of record in this case designated as follows:

Complaint; affidavit in attachment; undertaking in attachment; summons; writ of attachment; amended complaint; answer; replication; order, trial; order, trial continued; order, trial continued; leave to amend complaint, contained in pages from one to thirty, and also page thirty-one, inclusive, of said record.

Also the following: Order, trial; order, trial continued; order, trial continued; verdict; motion for new trial; order, motion for new trial taken under advisement, and contained in pages fifty-two to fifty-seven and a half, inclusive.

And also the following: Bond, writ of error, and citation, contained in pages one hundred and six to one hundred and ten, inclusive.

It is further stipulated between the parties that this agreement shall go into effect as though all the provisions and conditions of

said rule had been complied with, and the clerk is directed to print the record in accordance with this stipulation.

Dated June 30, A. D. 1887.

ATTERSON W. RUCKER, *In Pro Per.*
PATTERSON & THOMAS,
Attorneys for Defendant in Error.

124 [Endorsed:] Sup. Court U. S. 1887, Oct. term. No. 1306. Atterson W. Rucker, pl'ff in error, *vs.* Jerome B. Wheeler. Stipulation of counsel omitting parts of record in printing. Filed Nov. 21, 1887.

Endorsed on cover: Colorado C. C. U. S. No. 1306. Atterson W. Rucker, plaintiff in error, *vs.* Jerome B. Wheeler. Filed November 21, 1887.

1-63

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 200.

DAYTON S. MORGAN AND E. ASHLEY SMITH, PLAINTIFFS IN ERROR,

vs.

FREDERICK EGGERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY 13, 1885.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA

accession 21880

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 200.

DAYTON S. MORGAN AND E. ASHLEY SMITH, PLAINTIFFS IN ERROR,

vs.

FREDERICK EGGERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 4, 1887.

#44329
Reid
7/28/27

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and eighty-two, before the Honorable Walter Q. Gresham, judge of the district court of the United States for said district and *ex officio* judge of said circuit court.

DAYTON S. MORGAN and E. ASHLEY SMITH
vs.
FREDERICK EGGERS. } 7488.

Ejectment.

Be it remembered that heretofore, to wit, on the 26th day of July, 1882, the plaintiffs, by U. J. Hammond, their attorney, filed in the office of the clerk of said court their complaint in the above-entitled cause in the words following, to wit:

The plaintiffs, Dayton S. Morgan and E. Ashley Smith, citizens of the State of New York, complain of the defendant, Frederick Eggers, a citizen of the State of Indiana, and say—

That they, plaintiffs, as tenants in common, are the owners in fee-simple and entitled to the possession of the following-described real estate in the county of Lake, in the State of Indiana, at the district aforesaid, to wit:

2 All of the north part of lot two (2), in section thirty-six (36), township thirty-eight north, of range ten (10) west, of the second principal meridian, which lies west of the track of the Lake Shore and Michigan Southern railroad and north of a line parallel with the north line of said lot two (2) and seven hundred and fifty-three (753) feet south therefrom; that the defendant, Frederick Eggars, at the district aforesaid, now holds possession of the said described real estate without right, and for more than a year past has unlawfully kept the plaintiffs out of possession.

Wherefore the plaintiffs demand judgment for the recovery of said real estate and two thousand dollars damages for being kept out of possession, and for other proper relief.

U. J. HAMMOND,
Att'y for Plaintiffs.

And afterwards, to wit, at the May term of said court, on the 10th day of August, 1882, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by A. C. Harris, his attorney, and files his motion to require the plaintiff- to file an abstract of title herein; and said motion is in the words following, to wit:

The defendant moves that the plaintiffs be ruled to file an abstract of title showing their alleged title to said lands, to the end that he may be advised as to their pretended title to the lands in controversy.

A. C. HARRIS, *For Def't.*

3 And afterwards, to wit, at the May term of said court, on the 31st day of August, 1882, in recess thereof, the following further proceedings in the above-entitled cause were had, to wit: Comes now the plaintiff-, by counsel, and files an abstract of title herein in the words following, to wit:

Abstract of title to lot 2 of S. W. ¼ of section 36, T. 38 N., R. 10 west, in Lake county, State of Indiana. This section is divided into four lots, of which lot 2 falls in the southwest quarter of the section.

1. United States to the State of Indiana. Swamp land patent No. 4, dated March 24th, 1853.

2. The State of Indiana to George W. Clarke. Swamp land patent No. 5904, dated July 3d, 1854; consideration, $76.88; conveys said lot 2.

3. Last will and testament of George W. Clarke, who died Aug. 15th, 1866. Recorded in Lake county, Indiana, December 26th, 1866; conveys same land.

4. Jacob Forsyth and Robert D. Clarke, executor of the last will of George W. Clarke, deceased, to Caroline M. Forsyth. Executor's deed, dated Dec. 1st., 1868; consideration, $10,000; conveys said lot 2 and other lands.

4 5. Sarah J. Clarke and Harriet S. Clarke to Caroline M. Forsyth. Quitclaim deed, dated Dec. 1st, 1868; convey- all right, title, and interest in all the lands belonging to the estate of George W. Clarke, deceased.

6. Robert D. Clarke & wife to Caroline M. Forsyth. Quitclaim deed, dated Dec. 1st, 1868; conveys all right, title, interest in and to all the lands belonging to the estate of George W. Clarke, deceased.

7. Henry F. Clarke & wife to Caroline M. Forsyth. Quitclaim deed, dated Dec. 1st, 1868; conveys all right, title, and interest in all the lands belonging to the estate of George W. Clarke, deceased.

8. Caroline M. Forsyth & husband to Daniel A. Jones, Oramel S. Hough, Charles M. Culbertson, and Charles L. Raymond. Warranty deed, dated March 9th, 1869; consideration $11,038.30; conveys said lot 2 with other lands.

5 9. Charles L. Raymond to Herbert B. Reed. Deed, dated July 15th, 1869; consideration, $5,000; conveys the undivided one-fourth of said lot 2 with other land.

10. Daniel A. Jones & wife, Charles M. Culbertson & wife, Oramel S. Hough & wife, and Herbert B. Reed to Edward Roby. Deed, dated July 15, 1873; consideration, $63,076; conveys said lot 2 with other lands.

11. Edward Roby to Dayton S. Morgan. Deed, dated Aug. 7th, 1873; conveys said lot 2 with other lands.

12. Dayton S. Morgan & wife to E. Ashley Smith. Deed, dated January 17th, 1877; conveys one undivided half of said lot 2 with other lands.

And afterwards, to wit, at the May term of said court, on the 10th day of October, 1882, before the Honorable Walter Q. Gresham,

judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by counsel, and files his answer herein in the words following, to wit:

6 The defendant for answer denies every allegation in the complaint.

A. C. HARRIS,
For Def't.

And afterwards, to wit, at the November term of said court, on the 20th day of January, 1883, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by counsel, and by agreement this cause is submitted to the court for trial, and the court, having heard the evidence and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot 2 as lies south of the south line of lot number one (1), as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, and assesses the damages at $1.00 and costs, taxed at $—, which the plaintiffs shall recover of defendant.

All of which is finally ordered, adjudged, and decreed.

And afterwards, to wit, at the November term of said court, on the 5th day of February, 1883, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the plaintiffs by counsel and file their motion for a new trial herein in the words following, to wit:

7 And now again come the said plaintiffs, by U. J. Hammond, Esq., their attorney, and move that the decision and finding in this cause may be set aside and annulled, and that a new trial of this cause may be granted for the following, among other, reasons, to wit:

1st. The said finding and decision is contrary to the law and the evidence.

2d. The said finding is contrary to the evidence.

3d. The said finding and decision is not sustained by the evidence.

4th. The said finding and decision is contrary to law.

(2 Tidd, pr. 905.) 5th. The said plaintiffs were surprised by a case falsely made by the defendant at the trial, which they had no reason to expect, and therefore did not come prepared to answer at the trial, namely, by the claim of said defendant, supported only by the testimony of his son, that Jacob Forsyth and the surveyor, Wait, pointed out and agreed upon the line occupied by the fence of defendant mentioned in said decision as the true bill of said Egger's land.

By the claim of said defendant, supported by his testimony alone, that George W. Clarke agreed with said defendant that the line oc-

cupied by said fence was the line between said defendant's and said Clarke's land.

By the claim of said defendant, supported by his own testimony and that of his son only, that a fence had been maintained on the line occupied by the fence in said decision mentioned for more than twenty years last past.

8 By the claim of said defendant, supported by the testimony of his son only, that for 20 years past he had occupied all the land as far south as said fence.

6th. The court admitted irrelevant evidence for the defendant against the objection of said plaintiff, and the decision of the court was based on such irrelevant evidence.

U. J. HAMMOND,
Att'y for Pl'ffs.

And afterwards, to wit, at the November term of said court, on the 6th day of March, 1883, before the Honorable Walter Q. Gresham, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come the parties, by counsel, and the court, being fully advised, now overrules plaintiffs' motion for a new trial; to which plaintiffs except, and the court allows plaintiffs 30 days in which to file bill of exceptions.

And afterwards, to wit, at the November term of said court, on the 23d day of April, 1884, before the Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come the plaintiffs in the above-entitled cause, by Upton J. Hammond and Edward Robey, their attorneys, and, by leave of court first had, file in said cause their motion in writing in the words and figures following, to wit:

9 The plaintiffs in the above-entitled cause, Dayton S. Morgan and E. Ashley Smith, move the court to amend and reform the judgment entered in the above-entitled cause at the November term of this court, 1882, on the 20th day of January, 1883, so that said judgment shall conform to the complaint in said cause, and to the finding or verdict of the court rendered upon the trial of said cause.

UPTON J. HAMMOND,
EDWARD ROBEY,
Attorneys for said Plaintiffs.

And at the same time said plaintiffs, by their said attorneys, also file proof of notice of said motion heretofore served upon the defendant, Frederick Eggers, and the said defendant now appears to said motion by Addison C. Harris, his attorney, and further day is given by the court for the hearing of said motion upon argument of respective attorneys.

And afterwards, to wit, at the May term of said court, on the 27th day of June, 1884, before the Honorable William A. Woods, one of

the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the court, being sufficiently advised in the premises, doth now overrule the motion filed by the plaintiffs herein on the 23d day of April, 1884, to amend and reform the judgment of the court heretofore entered herein; to which ruling of the court in overruling
10 said motion the plaintiffs, by their attorneys, now except and file their bill of exceptions herein in the words following, to wit:

Be it remembered that on the 23d day of April, 1884, the plaintiffs, Dayton S. Morgan and E. Ashley Smith, filed in the above-entitled cause their motion, in writing, to the court for the reformation, correction, and amendment of the finding and judgment of the court in said cause; which motion is in the words and figures following, to wit:

* * * * * * *

And, upon appearance to said motion by the defendant, Frederick Eggars, and argument thereof by his and plaintiffs' respective counsel, said motion was overruled by the court, the court filing the following opinion in that behalf:

"*Motion to Amend Judgment.*

WOODS, *Dist. Judge:*

Morgan and Smith sued Eggers in ejectment for the recovery of real estate described as follows:

All of the north part of lot two (2), in section thirty-six, &c., which lies west of the track of the Lake Shore and Michigan Southern railroad and north of a line parallel with the north line of said lot 2 and 753 feet south therefrom. The defendant answered by a general denial, and upon the issue so joined, a jury being waived and trial had by the court, a finding and judgment of the tenor following were entered:

11 Come the parties, and by agreement this cause is submitted to the court for trial, and the court, having heard the evidence and being fully advised, finds for the plaintiffs, and orders and adjudges that they are entitled to and shall have and recover of defendant the possession of so much of said lot two (2) as lies south of the south line of lot one (1) as indicated by a fence constructed and maintained by the defendant as and on said south line, &c.

The plaintiffs now insist that there is an unqualified general finding for the plaintiff, and that in conformity with this the judgment should have been for the recovery of the land as described in the complaint, and that so much of the description set forth in the judgment as refers to the fence constructed by the defendant should be expunged.

It was competent for the court under the issue to find to what extent the defendant was guilty or had held unlawful possession of the premises described, and if under the evidence it appeared that a

fence had become or was the boundary of such occupation it was proper that the fact should be stated in finding and judgment of the court.

The finding and judgment in this instance are not separate and distinct, as perhaps it would have been better to have had them. The meaning, however, is clear. It is as if the entry read in this way:

12 And the court, having heard the evidence, &c., finds and orders and adjudges that the plaintiffs are entitled to and shall have and recover of the defendants, &c.

The motion for correction is therefore overruled.

To which action and opinion of the court the plaintiffs now here at the time except, and pray that this their bill of exceptions in that behalf may be allowed, which is accordingly done; and, upon their motion, the same is ordered to be made a part of the record in this cause.

And afterwards, to wit, at the November term of said court, on the 8th day of January, 1885, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the plaintiffs, by counsel, and file their appeal bond herein in the sum of one thousand dollars ($1,000), with Edward Robey as surety thereon, and said bond is approved by the court.

13 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the 7th judicial circuit and district of Indiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Dayton S. Morgan and E. Ashley Smith and Frederick Eggers, a manifest error hath happened, to the great damage of the said Dayton S. Morgan and E. Ashley Smith, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 12th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 7th day of January, A. D. 1885.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

14 United States of America to Frederick Eggars, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 7th circuit and district of Indiana, wherein Dayton S. Morgan and E. Ashley Smith are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the district court of the United States for district of Indiana, this 9th day of January, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal Circuit Court of the United States, District of Indiana.]

WILLIAM A. WOODS.

15 The appellee hereby accepts service of this writ.
January 9, 1885.

HARRIS & CALKINS,
Att'ys for Fred. Eggers.

16 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the proceedings in the cause of Dayton S. Morgan *et al. vs.* Frederick Eggers, No. 7488, as fully as the same appears of record and remains upon file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 6th day of January, 1885.

[Seal of the United States Circuit Court, Dist. of Ind.]

NOBLE C. BUTLER, *Clerk.*

[Endorsed in pencil:] Fees, $6.00. Noble C. Butler, clerk.

17 Afterwards—that is to say, at the October term, A. D. 1884, of the Supreme Court of the United States, the said Dayton S. Morgan and E. Ashley Smith, by Edward Roby, their attorney, appear before the said Supreme Court and plead that in the record and proceedings aforesaid and also in the giving of the judgment aforesaid there is manifest error, in this respect: That said judgment doth not pursue the issue and finding thereon rendered and entered of record as the law directs and requires; also the circuit court erred in refusing to amend and reform said judgment.

Wherefore said plaintiffs in error pray that so much of said judgment as appears to be erroneous may be reversed, annulled, and set

aside, and that the judgment of the circuit court in refusing to amend and reform said judgment may be reversed, and that said judgment on the issues in said cause may be reformed and amended, and such further proceedings had that there may be no error therein.

EDWARD ROBY,
Attorney and Counsel.

Endorsed on cover: Indiana C. C. U. S. No. 200. Dayton S. Morgan and E. Ashley Smith, plaintiffs in error, *vs.* Frederick Eggers. Filed January 13, 1885.

127-63

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

Affidavits as to Value of Land in Controversy.

DAYTON S. MORGAN and E. ASHLEY SMITH, Plaintiffs in Error,
vs.
FREDERICK EGGERS, Defendant in Error.
No. 200.

STATE OF INDIANA, *Lake County,* } *ss:*

The undersigned, Horace Marble, being first duly sworn, upon his oath says that he is the duly elected, qualified, and acting auditor and *ex officio* clerk of the board of commissioners of said county, and has been such ever since the month of March, 1884; that as such he is the legal custodian of the assessors' books of the township assessors of said county showing the valuations and assessments for general tax purposes of all the real estate in the several townships of the said county, and is also custodian of the records of the board of equalization of said county; that as such auditor it is his legal duty to make out and deliver to the treasurer of said county the tax duplicates by which the taxes of said county are collected; that the foregoing certified statement, dated February 27th, 1888, signed by affiant as such auditor, showing the valuations for general tax purposes for the several years of 1880 to 1887, both inclusive, of lot No. 1 and lot No. 2, of section 36, township 38, range 10, in said county, as made by the township assessors, is true and correct, and shows such valuation of said land as made by said assessors and fixed by the board of equalization of said county, and said statement is a true and complete copy as taken from the books and papers so on file in affiant's office.

Affiant further says it is, and for more than four years last past has been, the practice and custom of the several township assessors of said county and of the board of equalization of said county to rate, assess, and fix the value of all the real estate in said county at a sum equal to two-fifths of the actual or market value of such real estate; that the last real estate assessment in said county was made in the year 1886, and the assessment preceding the same in the year 1880.

Affiant further says that aside from said assessments of said lands he knows and is acquainted with the general market value of said lots No-. 1 and 2, and has so known and been acquainted therewith for more than three years last past; that in affiant's opinion said lots in the spring of 1885 were worth not to exceed $175.00 per acre, aside from improvements thereon; that said lands are so situated with reference to Lake Michigan and Cook county, Illinois (that

being the county in which is located the city of Chicago), that at times of speculative excitement in real estate a speculative value is ascribed to them which is often in excess of the real or cash price which they would sell for; but such speculative values are so fluctuating and temporary that they cannot be made the basis of permanent market price. Affiant further says that he is not in any way related to Frederick Eggers, nor has he any interest in any controversy concerning said lots or any part of them; and further affiant saith not.

HORACE MARBLE.

Subscribed and sworn to by the said Horace Marble before me the 27th day of February, 1888.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for Lake County, Indiana.

A statement of the valuation for general tax purposes for the several years of 1880 to 1887, both inclusive, as made by the township assessors of North township, in Lake county, Indiana, and as finally fixed by the boards of equalization of said county, of the following several tracts of land in said county, to wit:

Lot No. one (1), of section 36, township 38, range 10, containing (exclusive of railroad right of way) 25 acres.

For year—	*Valuation of land.*	*Val. of improvem'ts.*
1880	$400 00	$500 00
1881	400 00	500 00
1882	400 00	500 00
1883	400 00	500 00
1884	400 00	500 00
1885	400 00	500 00
1886	1,500 00	700 00
1887	1,500 00	700 00

Lot No. two (2), of section 36, township 38, range 10, containing 61.50 acres.

For year—	*Valuation of land.*	*Val. of improvem'ts*
1880	$922 50	00
1881	922 50	00
1882	922 50	00
1883	922 50	00
1884	922 50	00
1885	922 50	00
1886	3,997 50	00
1887	3,997 50	00

STATE OF INDIANA, } ss:
Lake County, }

I, the undersigned, Horace Marble, county auditor in and for said county, do hereby certify that the above and foregoing tabulated statement is a true and complete copy of the valuations, respectively, for general tax purposes of the said lots No-. 1 and 2, in section 36, township 38, range 10, in said county, for the several years of 1880 to 1887, both inclusive, as made and returned by the assessors of North township, of said county, and as fixed by the boards of equalization of said county, as the same appears of record in my office.

And I further certify that as such auditor I am the proper and legal custodian of all such records and the real estate assessment books of the township assessors of said county and of the records of the said boards of equalization.

In testimony whereof I have hereunto set my hand and official seal this February 27th, 1888.

[Seal Board of Commissioners, Lake County, Indiana.]

HORACE MARBLE, *Auditor.*

STATE OF INDIANA, } ss:
Lake County, }

Charles C. Smith, being first duly sworn, upon his oath says that he is the elected, qualified, and acting county treasurer of Lake county, Indiana, and as such treasurer he has the custody of the tax duplicates of said county showing the valuation and assessments for general tax purposes of all the real estate of said county, together with the taxes charged upon said real estate, and is charged with the collection of all such taxes. Affiant further says that he has read over and knows the contents of the affidavit and tabulated statement, dated February 27th, 1888, of Horace Marble, auditor of said county—which affidavit and statement are attached to this affidavit—and affiant says that all the facts set forth in said affidavit are true. Affiant further says that the rate of taxation, and for all purposes, and all the taxes charged to and assessed upon the said lots one (1) and two (2), was as follows: For the year 1885, 1.375 per centum; for the year 1886, 1.475 per centum, and for the year 1887 1.435 per centum upon the valuations as set forth in said tabulated statement. Affiant further says that he resides at Hammond, in North township, in said county, and has resided there for more than ten years last past; that he owns and during said years has bought and sold real estate in said township, and is and during the spring of 1885 was acquainted generally with the market value of land in said township; that said lots one (1) and two (2) during the spring of 1885 were worth not to exceed $175.00 per acre; that affiant is not related to Frederick A. Eggers, and has no interest in said lands nor in any controversy concerning the same; and further affiant saith not.

C. C. SMITH.

Subscribed and sworn to by the said Cyrus C. Smith before me this 27th day of February, 1888.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for Lake County, Indiana.

[Endorsed:] Aff's of auditor & treasurer.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Frank Hess, being first duly sworn, upon his oath says that he resides at Hammond, in North township, in said county and State, and has resided in said North township for more than thirty years last past; that he is the duly elected, qualified, and acting assessor of real and personal property in said township, having been elected as such in the spring of 1886; that the last assessment of the real estate of said township for general tax purposes was made in the spring of 1886 by affiant as such assessor; that affiant is acquainted with the value of real estate in said township, and has been acquainted with its value for more than ten years last past, and is acquainted with lots No-. 1 and 2, in section 36, township 38, range 10, in said county; that said lots at said real estate assessment in the spring of 1886 were valued and assessed at $65.00 per acre, and the permanent improvements on the said lot No. 1 at $700.00; that at the preceding assessment, which was made in 1880, said lot No. 1 was assessed at $15.00 per acre and said lot No. 2 at $15.00 per acre.

Affiant further says that prior to the making of the assessment of 1886 the several township assessors of said county met and resolved to assess all the real estate of said county at two-fifths its real or market value, and in pursuance of such resolution affiant, as such assessor, assessed the said lots 1 and 2 at the rates aforesaid.

Affiant further says that the market value of said lots No-. 1 and 2 was, in 1885, not to exceed $175.00 per acre; that affiant is in no way related to Frederick A. Eggers, and has no interest in said lots 1 and 2 or in any controversy concerning the same or any part of them.

FRANK HESS, *Assessor.*

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Frank Hess before me this 28th day of February, 1888, as witness my hand and notarial seal.

JOHN KREUTER,
Justice of the Peace for said County.

[Endorsed:] Aff. of Hess.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, John Wonnacott, aged 62 years, being first duly sworn, upon oath deposes and saith that he is, and for more than 20 years last past has been, acquainted and familiar with the following land, namely, a strip of land running from the State line between Indiana and Illinois east to the Lake Shore & Michigan Southern railroad and extending north to the width of 753 feet from the south line of lot No. 1, in section 36, township 38 north, range 10 west, in Lake county, Indiana, said south line being indicated by a fence constructed and maintained by Frederick Eggers as and on said south line, there being contained in said strip 16.85 acres.

And deponent further states that he resides at Whiting, in said county, about 2½ miles from said land, and has resided there for over 20 years last past; that he, deponent, has owned & bought real estate in the immediate neighborhood of the above-described land, and that he is, and on the 13th of January, 1885, and for more than 15 years before that date was, familiar and acquainted with the value of real estate in the neighborhood of the land hereinbefore first described and acquainted with the value of said described real estate.

That said 16.85-acre strip of land on said 13th day of January, 1885, was worth not to exceed one hundred dollars per acre, making said strip worth, in the aggregate, not to exceed $1,685.00; that said land was at no time from the year 1881 until the year 1886 worth more than the value above stated.

That said sixteen and $\frac{85}{100}$ acre strip of land is crossed by the right of way, 100 feet in width, of the Pittsburgh, Ft. Wayne and Chicago railroad, and also by the public highway, 80 feet in width; that said quantity of sixteen and $\frac{85}{100}$ acres includes both said right of way and said public highway; that said strip of land is low and wet and much of it marshy and miry at certain seasons of the year; that outside of said right of way and said highway there are no improvements on said land except some fences, a small dwelling-house, and outbuildings erected there by Frederick Eggers, and some fruit trees planted by him; and further affiant saith not.

JOHN WONNACOTT.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said John Wonnacott before me this first day of Feburary, 1888, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Henry Reese, aged 60 years, being first duly sworn, upon his oath states that he resides at Whiting, in said county, and has resided there during the 34 years last past; that he is well acquainted and familiar with lots No-. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 30 years prior thereto; that he knows the said 16.85-acre strip designated and described in the affidavit of John Wonnacott, dated of this day and hereto attached, and is, and ever since the 1st day of January, 1855, has been, acquainted with the value of said strip of land; that said 16.85-acre strip of land on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $130.00 per acre; that said entire 16.85-acre strip on said day was worth the sum of $2,190.50; that said strip of land extends from the State line between Indiana and Illinois east to the Lake Shore and Michigan Southern railroad, and from the south line of said lot No. 1, as indicated by a fence built and maintained by Frederick Eggers, north to the width of 753 feet, and is the land upon which said Eggers lives. Affiant further says that he owns and has bought real estate in the neighborhood of said land; and affiant further saith not.

H. REESE.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Henry Reese before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Frank Horlbeck, aged 24 years, being first duly sworn, upon his oath states that he resides at Whiting, in said county, and has resided there during the 24 years last past; that he is well acquainted and familiar with lots No-. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 5 years prior thereto; that he knows the said 16.85-acre strip designated and described in the affidavit of John Wonnacott, dated of this day and hereto attached, and is, and ever since the 1st day of January, 1880, has been, acquainted with the value of said strip of land; that said 16.85-acre strip of land on

the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $110.00 per acre, making said entire strip worth $1,850.50 on said day; that said land has at no time during the 5 years last past been worth to exceed said sum; that affiant has bought and now owns real estate in the neighborhood of said strip of land; and further affiant saith not.

FRANK HORLBECK.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Frank Horlbeck before me this first day of February, 1888, as witness my hand — seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, William Vater, aged 33 years, being first duly sworn, upon his oath states that he resides at Whiting, in said county, and has resided there during the 19 years last past; that he is well acquainted and familiar with lots No. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and *and* market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 15 years prior thereto; that he knows the said 16.85-acre strip designated and described in the affidavit of John Wannacott, dated of this day and hereto attached, and is, and ever since the 1st day of January, 1873, has been, acquainted with the value of said strip of land; that said 16.85-acre strip of land on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $150.00 per acre; that affiant owns, and for more than 3 years last past has owned, land in the neighborhood of said land above described; and further affiant saith not.

WILLIAM VATER.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said William Vater before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Henry Schrage, aged 44 years, being first duly sworn, upon his oath states that he resides at Whiting, in Lake county, Indiana, and has there resided during the 33 years last past;

that he is well acquainted and familiar with lots 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 20 years prior thereto; that he knows the said 16.85-acre strip of land designated and described in the affidavit of John Wonnacott, this day dated and attached hereto, and is and was acquainted with the value of said strip for (20) twenty years last past; that said 16.85-acre strip on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $155 per acre; that said entire 16.85-acre strip on said 13th day of January, 1885, was worth $2,631.75 dollars and no more; that said strip extends 753 feet north from the south line of said lot No. 1 and from the State line between Indiana and Illinois east to the Lake Shore and Michigan railroad, and is the land upon which Frederick Eggers resides; that affiant lives about 2½ miles from said strip of land, and that affiant owns and has both bought and sold real estate in the neighborhood thereof; & further affiant saith not.

H. SCHRAGE.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Henry Schrage before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, John Stangel, being first duly sworn, upon his oath states that he is 41 years of age and resides at South Chicago, in Cook county, Illinois, and has resided there continuously since the year 1869; that affiant is well acquainted with Frederick Eggers and is well acquainted and familiar with lots 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and has known said lots since 1869; that affiant is, and on January 13th, 1885, and for more than 10 years prior thereto, was well acquainted with the value and market price of real estate in the vicinity of said lots, and of said lots, and also of the 16.85 acre strip of land off of the south side of said lot No. 1, which is more particularly described in the affidavit of John Wonnacott, this day made and hereto attached; that said 16.85 acre strip of land on January 13th, 1885, was worth not to exceed 120 dollars per acre, said strip altogether being then worth 2,022.00 dollars; that affiant so resides about one and one half miles from said strip of land and has bought and owns lands in the neighborhood thereof; further affiant saith not.

JOHN STENGEL.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said John Stangel before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Indiana, Lake Co.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, John Kreuter, aged 52 years, being first duly sworn, upon his oath states that he resides at Sheffield, in said county, and has resided there during the 21 years last past; that he is well acquainted and familiar with lots No-. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 15 years prior thereto; that he knows the said 16.85-acre strip designated and described in the affidavit of John Wonnacott, which is dated of this day and hereto attached, and is, and ever since the 1st day of January, 1867, has been, acquainted with the value of said strip of land; that said 16.85-acre strip of land on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $150.00 per acre; that said strip of land is a part of the said lot No. 1, and extends from the State line between Indiana and Illinois east to the Lake Shore and Michigan Southern railroad, and is the land upon which Frederick Eggers now lives; that affiant resides about one mile from said strip, and has bought and now owns real estate in the immediate neighborhood of said strip; that the value of the said entire 16.85 acres of land on January 13th, 1885, was 2,527.50 dollars and no more, and its value at no time during the past 15 years exceeded said sum; and further affiant saith not.

JOHN KREUTER.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said John Kreuter before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Henry D. Eggers, aged 70 years, being first duly sworn, upon his oath states that he resides near Whiting, in said county, and has resided there during the 38 years last past; that he is well acquainted and familiar with lots No-. 1 and 2, in section 36,

township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 35 years prior thereto.

That he knows the said 16.85-acre strip designated and described in the affidavit of John Wonnacott, dated of this day and hereto attached, and is, and ever since the 1st day of January, 1885, has been, acquainted with the value of said strip of land.

That said 16.85-acre strip of land on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $125.00 per acre; that the said entire strip is, and on said 13th day of January, 1885, was, worth $2,106.25.

That affiant has bought and sold and now owns real estate in the neighborhood of said strip of land; that said strip of land is a part of said lot No. 1, and is the *the* land upon which Frederick Eggers, who is affiant's brother, now lives; that said land has at no time during the 10 years last past been worth to exceed said sum of 125.00 dollars; that said affiant lives within 3 miles of said strip of land; and further affiant saith not.

HEINRICH D. EGGERS.

STATE OF INDIANA, *Lake County,* } *ss:*

Subscribed and sworn to by the said Henry D. Eggers before me this first day of February, 1885, as witness my hand and seal.

[Notarial Seal, Lake Co., Indiana.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, *Lake County,* } *ss:*

The undersigned, Herman F. Vater, aged 22 years, being first duly sworn, upon his oath states that he resides near Whiting, in said county, and has resided there during the 20 years last past; that he is well acquainted and familiar with lots No. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is also well acquainted with the value and market price of said land and with the value and market price of lands generally in the neighborhood of said lots; that he was so acquainted with such values on the 13th day of January, 1885, and for 7 years prior thereto; that he knows the said 16.85-acre strip designated and described in the affidavit of John Wonnacott, dated of this day and hereto attached, and is and ever since the 1st day of January, 1882, has been acquainted with the value of said strip of land; that said 16.85-acre strip of land on the 13th day of January, 1885, and during three years immediately previous thereto was worth not to exceed $120.00 per acre; and further affiant saith not.

HERMAN F. VATER.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Herman F. Vater before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Indiana, Lake Co.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Andrew Schmit, being first duly sworn, says that he is 34 years of age and resides at South Chicago, Cook county, Illinois, and has resided there continuously since the year 1873; that he is acquainted with Frederick Eggers and knows and is well acquainted with lots No-. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and is and for more than 10 years last past has been well acquainted with the market value of said lands and of real estate in the vicinity of said lands; that affiant knows the 16.85-acre strip of land off of the south end of said lot No. 1, it being the real estate upon which said Frederick Eggers lives, and being more particularly described in the affidavit of John Wonnacott, this day made and hereto attached, and is and for more than 10 years last past has been acquainted with the market value of said strip of land; that said 16.85-acre strip of land on the 13th day of January, 1885, was worth not to exceed one hundred dollars per acre, making the total value of said entire strip on said day $1,685.00 dollars; that the market value of said strip has at no time during said 10 years last past exceeded $100.00 per acre; that affiant owns and has bought real estate in the neighborhood of said strip; & further affiant saith not.

ANDREW SCHMIT.

STATE OF INDIANA, } ss:
Lake County, }

Subscribed and sworn to by the said Andrew Schmit before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal, Indiana, Lake County.]

J. FRANK MEEKER,
Notary Public in and for said County.

STATE OF INDIANA, } ss:
Lake County, }

The undersigned, Martin Hansler, being first duly sworn, upon his oath states that he is 39 years of age and resides at South Chicago, in Cook county, Illinois, about 1½ miles from the strip of land hereinafter described, and has resided there continuously since the year 1862; that affiant is well acquainted with lots Nos. 1 and 2, in section 36, township 38, range 10, in Lake county, Indiana, and

with the market value of said lots and of real estate in the vicinity thereof, and was so acquainted with such value on January 13th, 1885; that affiant is also well acquainted with the 16.85-acre strip of land off of the south side of said lot No. 1, being the land upon which Frederick Eggers lives, and also with its value and market price, both now and on the 13th day of January, 1885; that said strip of land on said 13th day of January, 1885, was worth not to exceed 130 dollars per acre, making the value of said entire strip $2,190.50; that affiant refers to the affidavit of John Wonnacott, hereto attached, for a more particular description of said 16.85 acre strip; that affiant owns and has bought and sold real estate in the neighborhood of said land; and further affiant saith not.

MARTIN HANSLER.

STATE OF INDIANA, }
Lake County, } *ss:*

Subscribed and sworn to by the said Martin Hansler before me this first day of February, 1888, as witness my hand and seal.

[Notarial Seal., Indiana, Lake County.]

J. FRANK MEEKER,
Notary Public in and for said County.

[Endorsed:] Morgan *et al. v.* Eggers.

[Endorsed:] No. 200. Supreme Court of the U. S. 1887, Oct'r term. Dayton S. Morgan & E. Ashley Smith, plaintiffs in error, *vs.* Frederick Eggers, defendant in error. Affidavits as to value of land in controversy on part of defendant in error.

[Stamped:] Office Supreme Court U. S. Filed Mar. 19, 1888. James H. McKenney, clerk.

UNITED STATES OF AMERICA:

Supreme Court. October Term, A. D. 1887.

No. 200.

DAYTON S. MORGAN and E. ASHLEY SMITH, Plaintiffs in Error,

vs.

FREDERICK EGGERS, Defendant in Error.

Charles B. Farwell, being duly sworn, says that he is, and and for more than thirty years past has been, doing business in Chicago, Cook county, Illinois, has been county clerk and chairman of the board of superiors of said county, and has served four terms in the Congress of the United States as Representative from one of the districts within said county, and is now one of the Senators from the State of Illinois, sitting in the present Congress.

Deponent has during all said years been deeply interested in the growth of said county and in the things that concerned property therein. Deponent owns land near the Board of Trade in Chicago, and during all said years has owned land in Chicago; and deponent has carefully watched those general causes, which are by all understood to give permanent value to lands in their vicinity. Deponent is acquainted with the improvements done and contemplated by the United States Government on the Calumet river and harbor, to make them navigable for the largest vessels used on the great lakes, as well as also with the great commercial and manufacturing industries in operation on said river. Deponent is also acquainted with the suburban trains of the Lake Shore and Michigan Southern and the Pittsburgh, Fort Wayne and Chicago railroads, connecting the State line

of Indiana with the heart of Chicago and with the Board of Trade thereof. Deponent is also acquainted with the settlement, etc., about Colehour depot and Colehour Junction, more particularly described in the affidavits of Christopher McLennan, William E. Mason, R. W. Dunham, and Edward Roby filed herein; and deponent verily believes the $14\frac{14}{100}$ acres of land in said affidavits described is, and at all times since July 1, 1882, has been, worth more than $1,500.00 per acre.

C. B. FARWELL.

Subscribed and sworn to before me this 31st day of March, A. D. 1888, at Washington city, District of Columbia.

[SEAL.] R. B. NIXON,
Notary Public.

[Endorsed:] No. 200. U. S. Supreme Court. Oct. term, A. D. 1888. Morgan *et al. vs.* Eggers. Affidavit of Hon. C. B. Farwell.

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UNITED STATES OF AMERICA:

Supreme Court. October Term, A. D. 1887.

DAYTON S. MORGAN and E. ASHLEY SMITH, Plaintiffs in Error,
vs.
FREDERICK EGGERS, Defendant in Error.

R. W. Dunham, being duly sworn, says that he resides in Cook county, Illinois, and is the Representative in the present Congress of the congressional district embracing the Calumet river and Colehour stations and bounding on the State line of Indiana. Deponent is acquainted with the improvements done and contemplated by the United States Government on the Calumet river, to make it navigable for the largest class of vessels navigating the Great Lakes. Deponent is also acquainted with the great manufacturing and commercial industries on said river in full operation. Deponent is also acquainted with the land about Colehour stations (103d street), and he verily believes that the 14 acres lying between 106th street produced and the Lake Shore and Michigan Southern railroad and the State line, and known as that part of lot 2, T. 36 N., R. 2 W., 2d P. M., lying west of the Lake Shore and Michigan Southern railroad and north of a line parallel with the north line of said lot 2 and 753 feet distant therefrom, is, and ever since July 1, 1882, has been, worth more than $1,500 per acre.

R. W. DUNHAM.

Subscribed and sworn to before me this 22d day of March, 1888.
[Seal John H. Rogers, Notary Public, District of Columbia.]

JOHN H. ROGERS,
Notary Public, D. C.

[Endorsed:] No. 200. Morgan *et al. v.* Eggers. Affidavit of Hon. R. W. Dunham.

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UNITED STATES OF AMERICA SUPREME COURT.

OCTOBER TERM, A. D. 1888.

DAYTON S. MORGAN and E. ASHLEY SMITH.

vs.

FREDERICK EGGERS.

William E. Mason, being sworn, says he resides in Chicago, in the State of Illinois, and when at home is a practising lawyer of that city; that he is now a member of Congress from said place, in attendance on the present session of Congress.

Deponent is acquainted with the land in the vicinity of the State line monument, south of the Lake Shore and Michigan Southern railroad, north of 106th street and between said railroad and the State line of Illinois, being about a quarter of a mile from the depot of said railroad at 103d street, known as Colehour depot, and less than quarter of a mile from the station of the Pittsburgh, Fort Wayne and Chicago railroad and the Pan Handle railroad at 104th street, known as Colehour Junction, from which the Board of Trade of Chicago is about 42 minutes' ride; and deponent says that said land above described is, and ever since July 26, 1882, has been, worth more than five hundred dollars an acre, and if there is 14 acres thereof it is, and since said date has at all times been, worth more than seven thousand dollars.

Deponent understands that the locality named is connected with the heart of Chicago by more than 20 trains each way, at low rates of fare, and that the distance from the Board of Trade of Chicago to said lands by way of such trains does not exceed fifty minutes.

Deponent understands that said land is within one mile of the Calumet river and harbor, for which Congress has been making appropriations every year for 18 years, and has entered on a special plan of improvement to make it navigable for the largest vessels navigating the lakes; that they can draw only 16 feet of water up the Chicago river, and are so cramped by bridges as to make great difficulties; that they are now drawing 20 feet of water to the North Chicago Rolling Mills at said Calumet river and 17½ feet of water to the Lehigh coal docks.

Deponent is informed and believe- that said North Chicago Rolling Mills produce upwards of 4,600 tons of Bessemer steel rails per week (being above 46 miles of railroad at 90 tons to the mile, or 77 miles at 60 tons to the mile), and is —, and for more than 5 years past has produced, more steel rails than any rail mill in the world; that the nail mill on 106th street, built prior to 1882, is the largest nail mill in the world; that the largest lumber yards in the world and one of the largest salt docks in the world is within one mile of the land above described, being situated on said Calumet river.

And deponent says said land is necessarily to be valued as city property; its market value is that which it will bring in the city to persons who require the same for such uses as city and suburban property is required, and that the opinion of a farmer or agriculturist or country person, who resides miles away from city influences and miles beyond such lands, is of no value whatever as to the market value of such lands.

Deponent has for many years prior to coming to Congress acted as an attorney for the Illinois Central railroad, of which William K. Ackerman was for many years president, and has for many years been connected with and observed the determination of the value of land to be taken, which were suburban lands, and believes himself qualified to speak of the value of the opinions of countrymen on the market value of such lands.

WILLIAM E. MASON.

Subscribed and sworn to before me this 20th day of March, A. D. 1888.

[Seal John H. Rogers, Notary Public, District of Columbia.]

JOHN H. ROGERS,
Notary Public, D. C.

Daniel N. Bash, being duly sworn, says that he is — years old; is now a paymaster in the United States Army; has been engaged in real estate business in Chicago for 12 years prior to a few years since; that he knows that part of lot 2, in section 36, township 38 north, range 10 west, of the 2d principal meridian which lies west of the Lake Shore and Michigan Southern railroad and north of a line parallel with the north line of said lot and 753 feet south therefrom, containing about 14 acres; that he has owned land in that vicinity and is familiar with the subdivision and sale of the lots in the section adjoining the same in Illinois. Deponent has read the foregoing affidavit of Hon. William E. Mason, and is acquainted with the great docking and manufacturing enterprises within a mile and a half of said land, mentioned in said affidavit of said Mason.

Deponent has bought and sold land in the vicinity of the land first above described, and deponent says that said land first above described is, and from July 26, 1882, has been, worth far more than five hundred dollars an acre.

Deponent further says that it is his experience as a real estate dealer in Chicago that a farmer or other countryman living and engaged in rural pursuits a mile or more beyond the suburbs is of very little or no value as to the value of such lands as those first above described.

DANIEL N. BASH.

Subscribed and sworn to before me this 20th day of March, A. D. 1888.

[Seal James D. Maher, Notary Public, District of Columbia.]

JAMES D. MAHER,
Notary Public.

Lelia P. Roby, being sworn, says she is 39 years old, resides in Chicago, and is the wife of Edward Roby; that she has read his affidavit herewith filed; that at her request said Roby went with her to said Eggers' house and she offered to try to compromise the case about the time it was begun, in 1882, leaving said Eggers one-half the land in controversy and giving one-half to said Morgan and Smith, and deponent says that said Eggers answered and said "that half is worth more than fifteen thousand dollars, and I am not going to give it up to them rich buggers." Deponent is acquainted with the value of land in that vicinity, has owned lots within a third of a mile of the said land in controversy in this suit from about 1877; that in and since 1884 she has seen lots purchased by her friends and paid for at $250 a lot and upwards, there being above ten different purchasers, and the aggregate of purchases exceeding 8 acres and exceeding $20,000.00 within one mile of said land; and deponent says that said land in controversy in this suit has at all times since July 1, A. D. 1882, been worth above a thousand dollars an acre—that is, above fourteen thousand dollars. Deponent has been offered $700 each for some of her own lots.

LELIA P. ROBY.

Subscribed and sworn to before me this 20th day of March, A. D. 1888.

[Seal James D. Maher, Notary Public, District of Columbia.]

JAMES D. MAHER,
Notary Public.

UNITED STATES OF AMERICA:

Supreme Court. October Term, A. D. 1888.

DAYTON S. MORGAN and E. ASHLEY SMITH, Plaintiffs in Error,

vs.

FREDERICK EGGERS, Defendant in Error.

Edward Roby, being duly sworn, says that *his* is 47 years old, and is the counsel for plaintiffs in error in this case; that March 15 instant deponent sent to defendant's counsel, at their request, abstracts of the affidavits of Dayton S. Morgan and E. Ashley Smith, and letter-press copies of the affidavits of Christopher McLennan and Joseph M. Spahn, and on the 16th deponent sent letter-press copies of the affidavits of James Tully, Frederick Jones, Patrick L. Murphy, Martin Finnerty, Patrick Reilly, and Matthias W. Gallistel, and of deponent as to the value of the land in controversy in this suit already filed herein; that deponent has never seen the affidavits for defendant in error filed yesterday until this morning.

Deponent for 15 years last past has practiced law in Lake county, Indiana, as well as in Cook county, Illinois, and deponent *deponent* has paid taxes in said Lake county every year since 1873, either personally or through an agent; that the law of Indiana requires the assessors to assess the lands in each county, etc., in said State, at

their full cash value, as appears by section 6379 of the revised statutes of said State, and that the assessor's oath requires that he shall so assess the same, as appears by section 6386 of said statutes; that deponent knows, as a fact, that the lands and property in Lake county, Indiana, is not and from 1880 to the present has not been assessed at its value; that appears by the affidavits of Horace Marble, county auditor, and Charles C. Smith, county treasurer, filed by defendant in error, but said officers are altogether wrong in saying that the violation of law by the assessors is to the extent of two-thirds of the value. The transcript of assessments filed by defendants shows an increase in value, from 1885 to 1886, from $922.50 to $3,997.50, but deponent says there was no change in market value at that time; it was merely discovered that the land was assessed far too low.

As to the affidavits filed by defendant in error as to value of the land, deponent says as to the affidavits of said county auditor and treasurer which do not state their residence, deponent says that their offices are at Crown Point, Indiana, about 56 miles by the usual routes of travel from the land in question, and that neither of them resides within many miles of the land in question; deponent knows this.

John Wannacott is a small farmer or teamster living 2½ miles out in the country, beyond said land. Deponent has know- him for 12 years and has known him as a poor man, an employee of said Eggers, the defendant.

Deponent does not know Henry Reese, but his affidavit gives his place of residence 2½ miles out in the country, beyond said land; Frank Horlbeck's residence is in his affidavit given at the same place; also William Vater (a cousin of said Eggers); also Henry Schrage; also Henry D. Eggers (a brother of said Frederick Eggers); also Herman F. Vater (another cousin of said Frederick Eggers). The residence of the above is given as at or near Whiting. Whiting is a hamlet of 4 or 5 houses, on the Lake Shore road, at which accommodations stop, and there is a post office. Its population consists of track hands or laborers, and there are no stores. It is 2½ miles from the edge of Chicago suburbs, and its population is poor, with no reason to know anything of the value of property in the suburbs of Chicago, having nothing in common with city business or suburban business.

Frank Hess gives his residence as Hammond, Ind., in his affidavit. Said Hammond is located on section 36, in township 37 north, range 2 west, and is six miles and a half south of the lands in question in this case, but between Hammond and the said lands so in question is a lake, known as Lake Wolf, more than 3 miles wide, and the nearest road from Hammond to the land in question is heavy and sandy, making a detour of some eleven miles to go around said lake.

Deponent knows John Kreuter, whose affidavit is filed by said defendant, and has known him 15 years. He lives at Sheffield station, in the only house at that station, a one-story hovel, where hunters sometimes stop. He lives more than a mile out in the country, be-

yond said land in question, and deponent believes he has never owned any land, unless he may own a little garden.

Martin Hansler, whose affidavit is also filed by said defendant in error, is also well known to deponent. He is a married man, having several children. He lives on the N. W. ¼ of sec. 5, T. 37 N., R. 15 E., of 3d principal meridian, and has lived there from 1871. His wife is the daughter of Frederick Eggers, the defendant in error, and his children are the grand-children of said Frederick Eggers. In or about the month of December, A. D. 1884, in the circuit court of Cook county, in and for the State of Illinois, in chancery, in a case wherein Robert D. Clark and others were plaintiffs and William H. Colehour and others defendants, in which William H. Goudy, Henry S. Monroe, and this deponent represented the defendants, the defendants called said Martin Hansler to testify to the value of the land adjoining the land of said Eggers, known as lot 1, next adjoining the land in question here, and deponent examined said Hansler as such witness, and said Hansler, being duly sworn, then and there testified that said land adjoining the State-line monument was worth three thousand dollars an acre, basing his oath on his knowledge of actual sales of land in that vicinity and on an offer of $3,000.00 an acre to said Frederick Eggers for all his land in said lot 1, adjoining the State-line monument, in Indiana, by John R. Hoxie, vice-president of the Union Stock-Yards at Chicago. If time should be allowed to deponent, deponent will procure and present a transcript of the testimony of said Hansler, duly certified under the seal of said circuit court, said testimony being part of the record in said cause in said court.

About the time this suit was brought in Indiana circuit court deponent's wife requested deponent to let her go with deponent to said Frederick Eggers and endeavor to settle the controversy by compromise, as "we own so much land near and will be near neighbors," and in deponent's presence deponent's wife asked said Eggers to divide the land here in controversy and take the north half and let Morgan and Smith have the south half, and said Frederick Eggers answered in deponent's presents that he would not do that; that either half was worth more than fifteen thousand dollars, and if he gave up the south half he would give up more than fifteen thousand thousand dollars' worth of land, and he would not do that.

Deponent has read the affidavit of Hon. William E. Mason, herewith presented, and deponent says that the matters stated therein as to railroad facilities and manufactures and improvements are true.

Some 24 local trains run each way between the land in question and the heart of Chicago. The fares are from 14 to 18½ cents, depending on the number of rides purchased. The time from Chicago Board of Trade to this land, via Lake Shore and Michigan Southern road, is 42 to 48 minutes, and from Madison-street bridge to said land, via the P., F. W. & Chicago railroad, is the same. About an equal number of local trains are, and for eight years past have been, run on each road.

The land in controversy is good land, three-fourths of it being

high and dry and one-fourth swamp, but all valuable for the purposes for which land is wanted in that vicinity.

Deponent was offered last week by William K. Ackerman, former president of the Illinois Central railroad and now acting for the Baltimore and Ohio Railroad Company, one thousand dollars an acre for a strip extending from Eggers' south line to Wolf lake, near the east line of the section on which said land is situate, being two hundred feet in width and containing 20 acres, and deponent believes it will be bought by said road within a month at $1,500 an acre, cash. The farmers, &c., in Whiting are not acquainted with the value of such land.

EDWARD ROBY.

Sworn to before me this 20th day of March, A. D. 1888.

[Seal of James D. Maher, Notary Public, District of Columbia.]

JAMES D. MAHER,
Notary Public.

[Endorsed:] Sup. Court U. S. 1887, Oct. term. No. 200. Dayton S. Morgan *et al.*, pl'ffs in error, *vs.* Frederick Eggers. Affidavits of value on part of pl'ff- in error.

[Stamped:] Office Supreme Court U. S. Filed Mar. 20, 1888. James H. McKenney, clerk.

24-63

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

DAYTON S. MORGAN and E. ASHLEY SMITH, Pl'ffs in Error,
vs.
FREDERICK EGGERS, Def't in Error.

Messrs. Harris & Calkins, counsel for def't in error:

Please take notice that I will file in the Supreme Court of the United States, on or before March 20th next, affidavits showing the value in controversy in this case to exceed five thousand dollars exclusive of costs, and that the case is within the jurisdiction of the Supreme Court.

Feb'y 14, 1888.

EDWARD ROBY,
Counsel for Pl'ffs in Error.

Service acknowledged.
Feb'y 16, 1888.

HARRIS & CALKINS,
Att'ys for Eggers.

Addison C. Harris. Wm. H. Calkins.

Law office of Harris & Calkins, Indiana National Bank building.

INDIANAPOLIS, IND., *Feb'y* 3, 1888.

Edw'd Roby, Esq., Chicago.

DEAR SIR: Mr. Eggers will not consent to my making the agreement respecting the value of the land as asked by you. I give you this information as soon as possible, as I only heard from him to-day.

Very truly, W. H. CALKINS.

P. S.—Send me a copy of your brief, please, right away.

In the Supreme Court of the United States. October Term, A. D. 1887.

DAYTON S. MORGAN & E. ASHLEY SMITH, Plaintiffs in Error,
vs.
FREDERICK EGGERS, Defendant in Error.

STATE OF NEW YORK, }
County of Monroe, } *ss:*

Dayton S. Morgan, being sworn, says: I am a plaintiff in error in this suit and was a plaintiff below. I am acquainted with the land in controversy and have been from 1873. At the time this suit was brought in the circuit court for Indiana, to wit, July 26, 1882, and ever since the value of the land in controversy was and ever since

has been more than ten thousand dollars. The same land is in controversy in this Court, and the value of the land in controversy in this suit in error is more than ten thousand dollars, so that I say the value in controversy in this case, both in this Court and in the circuit court of the United States for Indiana, exceeds five thousand dollars exclusive of costs.

DAYTON S. MORGAN.

Sworn to before me this 17th day of February, A. D. 1888.

{Seal Henry C. Hammond, Notary Public, Brockport, Monroe Co., N. Y.}

HENRY C. HAMMOND,
Notary Public.

In the Supreme Court of the United States. October Term, A. D. 1887.

DAYTON S. MORGAN & E. ASHLEY SMITH
vs.
FREDERICK EGGERS.

STATE OF NEW YORK, *County of Niagara,* } *ss:*

E. Ashley Smith, being sworn, says that he was one of the plaintiffs below in this case and is one of the plaintiffs in error in this Court; that he is acquainted with the land in controversy in this case, and has been from long prior to the dates named below, and with the value thereof; that the land in controversy in the circuit court of the United States for Indiana was, on the day this suit was brought therein, to wit, July 26, 1882, and ever since has been, worth more than ten thousand dollars; that the same land is in controversy in this suit in this Court, and deponent therefore says that the value in controversy in this case, both in this Court and in the circuit court of the United States for the district of Indiana, exceeds five thousand dollars, exclusive of costs.

E. ASHLEY SMITH.

Sworn to before me this 17th day of February, A. D. 1888.

[Seal Garrit G. Lansing, Notary Public, Niagara County, N. Y.]

GARRIT G. LANSING,
Notary Public in & for Niagara County, in the State of New York.

STATE OF ILLINOIS, *County of Cook,* } *ss:*

Edward Roby, being sworn, says he is 47 years of age, and is counsel for the plaintiff- in error in this case; that the value in controversy in this case exceeds five thousand dollars exclusive of costs. Deponent understood that it was fully conceded that the land in controversy was worth over $20,000.00 until very recently, when, as a matter of form, he asked a stipulation to that effect of the defendant's counsel.

The land in controversy is shown on the plat or map attached to the affidavit of Christopher McLennan, hereto annexed, and embraces 14 acres. The fence of the defendant Eggers, referred to in the judgment of the court below as the south line of lot one, as indicated by a fence constructed and maintained by the defendant as and on said south line, said fence running from the State line easterly to Lake Michigan, is shown in red on said plat. The land in lot 2, north of said fence, and west of the Lake Shore and Michigan Southern railroad, is about a quarter of an acre more than that described in the declaration in this case.

Deponent is acquainted with the value of lands in that vicinity, as follows: In 1875 the Baltimore, Pittsburgh and Chicago Railroad Company acquired the land marked B. & O. R. R. on said plat by condemnation. The commissioners fixed the value of the land taken alongside of the land in question in this suit, as well as through lot 1 on said plat, at $1,500 an acre. An appeal was taken, and the case was tried in and value determined by the circuit court of the State of Indiana in April, A. D. 1875. Deponent attended, at the request of said Eggers, as a witness for him upon the value, and was sworn and testified on his behalf as a qualified witness to the value of the land so taken, and the court adjudged the value of the land so taken to be $1,500 an acre.

In 1877, when the value of land in that vicinity was at the lowest ebb, deponent sold five acres, about 500 feet south of lot 4, in said section thirty-six, for one thousand dollars an acre to a responsible purchaser, who paid therefor in full in cash; said land was worth far less per acre than the land in controversy in this suit.

Deponent sold several small parcels within a mile of the land in controversy in this case, between 1877 and 1884, at the rate of from one thousand to four thousand five hundred dollars per acre.

In 1884 the Pennsylvania Company, operating the Pittsburgh, Fort Wayne & Chicago railroad and Pan Handle railroad, took possession of about 2 acres, extending to within about ten rods of the land in question, for side track and depot purposes under an agreement of purchase at $2,500.00 an acre, and deposited the money in bank in Chicago to be paid over as soon as the title could be transferred to it clear of incumbrances and as shown by the abstract.

In 1884 deponent and a cotenant caused a block of 4 acres to be subdivided and sold within three-quarters of a mile of the land in controversy in this suit; it made $9\frac{6}{10}$ lots to the acre, and the lots sold in 1884 for $400 each, being almost $4,000.00 per acre. More than half the lots were sold in that year, paid for in cash and well secured paper, and built upon with residences worth from $5,000 down to about $1,100; the balance has since been sold.

Deponent also knew of sales adjoining by said Christopher McLennan in 1884 at $400 to $500 a lot, besides many other sales in the vicinity from 1877 to the present; and deponent is well acquainted with the said land in controversy in this suit; and deponent says that on July 26, 1882, and from thence till January 20, 1883, and on that day and from thence till now the said land in

controversy in this suit has been at all times worth over twenty thousand dollars, being more than $1,500 per acre.

About the time this suit was begun in the court below deponent's wife desired deponent to effect a compromise with said Eggers, as said Eggers' land adjoins deponent's, and give him half of the land he claimed, and with his wife deponent visited said Eggers, and Mrs. Roby (deponent's wife) made the proposition, to which said Eggers answered: "The half I would let go is worth over ten thousand dollars."

EDWARD ROBY.

Subscribed & sworn to before me this 16th day of March, A. D. 1888.

{ Notarial Seal E. R. Bowen, Chicago, Cook Co., Ill., Insurance and Real Estate. }

E. R. BOWEN,
Notary Public, Cook County, Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

James Tully and Frederick W. Jones, being duly sworn, each upon his oath says: I am of lawful age. I know that part of lot 2, in section 36, township 38 north, range 10 west, of the 2d principal meridian, west of the Lake Shore and Michigan Southern railroad and north of a line 753 feet south of the north line of said lot and parallel therewith, which is occupied by Frederick Eggers. I reside and own property in the vicinity of said premises and know the value thereof, and have known the value of said premises from January 1, 1882, and said land above described has been at all times since January 1, 1882, and now is worth more than ten thousand dollars.

JAMES TULLY.
F. W. JONES.

Subscribed and sworn to severally by the above-named persons this 16th day of March, A. D. 1888.

{ Notarial Seal E. R. Bowen, Chicago, Cook County, Ill., Insurance and Real Estate. }

— —.

STATE OF ILLINOIS, } ss:
County of Cook, }

Patrick L. Murphy, being sworn, says that he resides in the city of Chicago and within a mile of lot 2, in section 36, township thirty-eight (38) north, range 10 west, of the 2d principal meridian; that he has lived within a mile of that property most of the time since 1853; that he is — years old, and for many years past, up to last summer, has been a policeman; is now a United States storekeeper; that he owns, and for a long time past has owned, property in the vicinity of said land; that he is acquainted with the value of land in that vicinity; that that part of said lot 2 west of the Lake Shore and Michigan Southern railroad and north of a line parallel with

the north line of said lot and 753 feet south therefrom, which is about the line of Frederick Eggers' south fence, is — more than fourteen thousand dollars, and has been — more than ten thousand dollars at all times since January 1st, 1882. Deponent is acquainted with Frederick Eggers, the defendant in error, but is not acquainted with Dayton S. Morgan or E. Ashley Smith, the plaintiffs in error.

PATRICK L. MURPHY.

Subscribed and sworn to before me this 14th day of March, A. D. 1888.

[Seal M. W. Gallistel, Notary Public, Cook County, Ills.]

MATTHIAS W. GALLISTEL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

Martin Finerty, being sworn, says he is 59 years old; that his business is farmer, and lives in the same district and precinct where State-line monument stands (so far as it is in Illinois); that Frederick Eggers' south fence is due east from one hundred*th* and six-street, on which deponent's property is *south of;* that deponent knows that — of lot 2, in section 36, township 38 north, range 10 west, of second principal meridian, occupied — said Eggers, north of said fence, being that part of said lot 2 west of Lake Shore and Michigan Southern railroad and north of line parallel with the north line of said lot and 753 feet south therefrom, containing about 14 acres. Deponent is well acquainted with the value of land in that vicinity. Deponent says that said fourteen acres *is*, and ever since January 1st, 1882, has been, worth upwards of seven thousand dollars. Deponent's residence is within one mile of said parcel of land, and deponent owns, and for more than ten years past hast owned, the same, such property being worth above seven thousand dollars.

MARTIN FINERTY.

Subscribed and sworn to before me this 15th day March, A. D. 1888.

[Seal M. W. Gallistel, Notary Public, Cook County, Ills.]

MATTHIAS W. GALLISTEL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

Patrick Reilly, being sworn, says he is 35 years old; that his business is policeman, and lives in the same district and precinct where State-line monument stands (so far as it is in Illinois); that Frederick Eggers' south fence is due east from one hundred and six- street, on which deponant's property is *south of;* that deponant knows that part of lot 2, in section 36, township 38 north, range 10 west, of second principal meridian, occupied by said Eggers, north of said fence, being that part of said lot 2 west of Lake Shore and Michigan Southern railroad and north of line parallel with the north line of

said lot and 753 feet south therefrom, containing about 14 acres; deponant is well acquainted with the value of land in that vicinity; deponent says that said fourteen acres is, and ever since January 1st, 1882, has been, worth upwards of ten thousand doll's; deponent's residence and place is within one mile of said parcel of land, and deponent owns, and for more than ten years past has owned, the same, such property being worth above ten thousand dollars.

PATRICK REILLY. [SEAL.]

Subscribed and sworn to before me this 15th day of March, A. D. 1888.

[Seal M. W. Gallistel, Notary Public, Cook County, Ills.]

MATTHIAS W. GALLISTEL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

M. W. Gallistel, being duly sworn, says he is 45 years old; that his business is dealing in real estate and selling lots as a real estate broker in the same district and precinct where the State-line monument stands (so far as it is in Illinois); that Frederick Eggers' south fence is due east from 106th street, on which deponent's property fronts; that deponent knows that part of lot 2, in section 36, township 38 north, range 10 west, of second principal meridian, occupied by said Eggers, north of said fence, being that part of said lot 2 west of the Lake Shore and Michigan Southern railroad and north of a line parallel with with the north line of said lot and 753 feet south therefrom, containing about 14 acres; deponent is well acquainted with the value of land in that vicinity, and deponant sais that said fourteen acres is, and ever since January 1, 1882, has been, worth upwards of ten thousand dollars; deponent's residence and place of business is within a mile of said parcel of land, and deponent owns, and for more than ten years past has owned, the same, such property being worth above ten thousand dollars, and much of the time deponent has kept the local post office.

MATTHIAS W. GALLISTEL.

Subscribed and sworn to before me this 14th day of March, A. D. 1888.

[Seal S. N. Dougherty, Notary Public, Cook Co., Ill.]

S. N. DOUGHERTY,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

Joseph Spahn, being duly sworn, says: I am 45 years of age. I know that part of lot 2, in section 36, township 38 north, range 10 west, of the second principal meridian, west of the Lake Shore and Michigan Southern railroad and north of a line 753 feet south of the north line of said lot and parallel therewith, which is occupied by Frederick Eggers, being about 14 acres of land. I reside and have my

place of business about a quarter of a mile from said premises and have so lived and done business there at that corner for more than 12 years past; my own real property on that corner and in that immediate vicinity is worth more than ten thousand dollars. I am and for the 15 years past have been acquainted with the value of land in that vicinity, and know that said parcel of said lot 2 above described has at all times from January 1, 1882, been and now is worth more than ten thousand dollars. I believe said 14 acres is worth and would easily sell in the market for more than ($10,000) ten thousand dollars.

JOSEPH M. SPAHN.

Subscribed and sworn to before me, this 14th day of March, A. D. 1888, Matthias W. Gallistel, a notary *of* public in and for said county of Cook and State *of*-foresaid. Ackno*lige* that he signed and made *advidavite.*

Given under my hand and notarial seal.

[Seal M. W. Gallistel, Notary Public, Cook County, Ills.]

MATTHIAS W. GALLISTEL,
Notary Public.

STATE OF ILLINOIS, } ss:
County of Cook, }

Christopher McLennan, being first duly sworn, says that he is 50 years of age, and by occupation a surveyor; that he resides in the territory formerly known as part of the village of Hyde Park, but lately annexed to the city of Chicago; that he has practiced his vocation of surveyor in Cook county, Illinois, and in Lake county, Indiana, for many years; that as early as 1873 he surveyed lots 2, 3, and 4 of section 36, township 38 north, range 10 west, of the 2d principal meridian, situate in the northwest corner of the State of Indiana, in Lake county, and the lands south thereof along the State line on both sides of said line; that he is acquainted with Frederick Eggers, the defendant in error in this case, but does not know Dayton S. Morgan or E. Ashley Smith, the plaintiffs in error.

This deponent says that in 1873 he surveyed and subdivided into lots and blocks, with streets and alleys, the south half of section 8, in township 37 north, range 15 east, of the 3d principal meridian, which adjoins lots 1 and 2 of section 36 aforesaid; that the field-notes of the surveyor general require the south line of said section 8 to intersect the State line 30 links north from the 159th mile post; that the 159th mile post stood $25\frac{85}{100}$ chains or $\frac{323125}{1000000}$ of a mile south of the center of the State-line monument, as appears by the deposition of Charles W. Catchcart, deputy surveyor of the United States, under whose supervision the same appears to have been constructed, which deposition is now before deponent.

Said State-line monument is a stone structure six feet square at the surface of the earth and 16½ feet high, on which are the following inscriptions deeply cut in the stone:

On the east, "Boundary of Indiana."

On the west, "Boundary of Illinois."

On the north, "Retraced under act of Congress 2d March, 1883."

On the south, "159.323 miles due north from the Wabash river."

Said monument is square, and its sides face the several points of compass. Deponent understands it to have been erected under plans now remaining in the office of the Commissioner of the General Land Office, of which copies are hereto annexed, being tracings of copies certified by said Commissioner under the seal of the Land Office.

Deponent is well acquainted with all the old surveyors of this county, and was himself the village engineer of Hyde Park from 1876 to 1884, except 2 years—from 1878 to 1880—said Hyde Park being a village of about fifty thousand population and including the said section 8 and so much of said monument as stands in Illinois; and he says there can be no doubt of the locality of the 159th mile post, as marked on the monument.

Deponent further says that by the Government plats and field-notes the line of boundary between lots 1 and 2 of section 36 aforesaid intersects the State line at a point eleven chains and forty-three links north of said mile post, being 754.38 feet, said point being 14.42 chains south of the center of said monument.

Deponent knows the locality of the fence erected and maintained by said Frederick Eggers from the State line eastward to Lake Michigan as and for the south line of his land (lot one of said section 36). Deponent has had the same surveyed, and the location of said fence is shown in red on the accompanying plat, hereto annexed.

Deponent has computed the area of that part of lot 2 aforesaid west of the Lake Shore and Michigan Southern Railroad and north of said fence, and finds such area to be 14.14 acres.

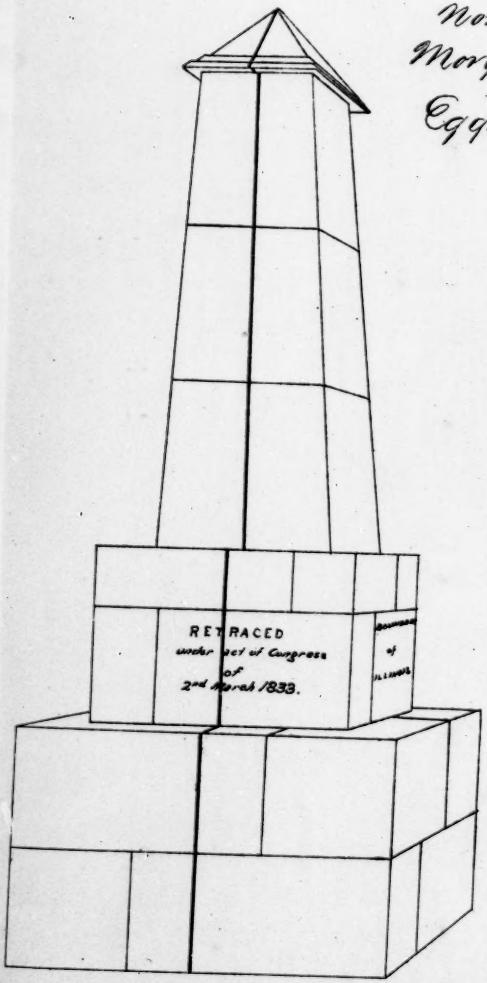
Deponent further says that within a mile of said last-mentioned land there is a large population, numbering several thousand; two large public schools, churches, post-office, depots, &c., and have been from prior to 1880. A street (horse) railroad is on Ewing avenue, a little more than half a mile from said land. Colehour depot, on the Lake Shore and Michigan Southern, and Colehour Junction, on the Pittsburgh, Ft. Wayne & Chicago and Pan Handle railroads, are within about quarter of a mile —, from which the local Chicago suburban trains run into the center of the city; local trains of the Pittsburgh, Fort Wayne & Chicago (or Pennsylvania) road starting at the edge of said land.

Deponent purchased land in said village of Hyde Park, in Ironworkers' addition to South Chicago (a subdivision of the south half of said section 8), in 1873, within three-quarters of a mile of said lot 2; also in Taylor's addition to South Chicago, within a mile of said lot 2; and deponent has sold, from time to time, lots therein, but still owns over 35 lots; and deponent has been and is acquainted with the value of land in that vicinity, and deponent says that said part of lot 2 lying west of said Lake Shore and Michigan Southern railroad and north of said fence of said Eggers is, and ever since the first day of January, A. D. 1882, has been, worth upwards of ten

B

PERSPECTIVE VIEW.

No. 200
Morgan et al
v
Eggers
} p. 20

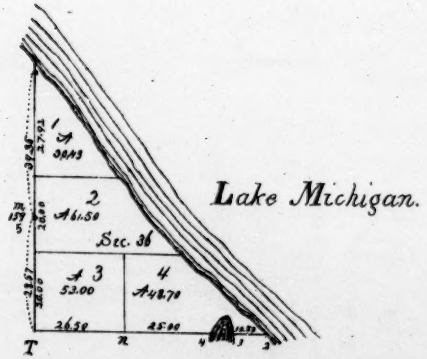


Copy sent to the Surveyor of the State of Indiana & Illinois March 30. 1842.

Township No. 38 N. Range No. 10 West. 2nd Mer. Indª

N.W. Corner of Indiana.

No. 200.
Morgan vs. } p. 21
Eggers.



Scale 40 Chains to an inch. Var. 6° 10' E.

Surveyed in 1836 by Andrew Burnside ... Deputy Surveyor.

I certify that the above is a true copy of the Original plat in this office.

Surveyor Generals Office
Detroit Nov. 1. 1849. Lucius Lyon Surv. Genl

thousand dollars; and deponent believes that by subdividing it in the usual manner in that vicinity into lots and blocks, with streets and alleys, making $9\frac{6}{10}$ lots to the acre—that is, 48 lots to every 5 acres—such lots would easily sell for two hundred dollars each; so subdividing would not cost to exceed five dollars per lot.

Deponent says that the annexed is a true copy of the Government map of said section 36, as the said map subdivides the same into lots by which the patents were issued, as deponent understands it, and that deponent has drawn thereon the said Lake Shore and Michigan Southern railroad; also the Baltimore and Ohio railroad; also said State-line monument, and also said fence, as the same appear on the ground, as determined by actual survey thereof. The figures given on said plat are copied from the Government maps or plats, or are taken from deponent's computations and surveys.

CHRISTOPHER McLENNAN.

Subscribed and sworn to before me this 14th day of March, A. D. 1888.

[Seal Lynn Helm, Notary Public, Cook Co., Ills.]

LYNN HELM,
Notary Public.

(Here follow diagrams marked pp. 18, 19, 20, & 21.)

THE STATE OF INDIANA, *ss:*

OFFICE OF THE AUDITOR OF STATE.

I, Edward H. Wolfe, auditor of state of the State of Indiana, do hereby certify that the above is a full, true, and complete copy of the original plat of the United States survey of township 38 north, of range 10 west, of the second principal meridian, as the same appears of record, duly certified as above set forth, in Plat Book No. 6 of said original surveys, now on deposit in my office, and of which I am the legal custodian.

Witness my hand and official seal this 29th day of November, A. D. 1882.

[Auditor of State's Seal, State of Indiana.]

E. H. WOLFE,
Auditor of State.

[Endorsed:] Supreme Court U. S. 1887, October term. No. 200. Dayton S. Morgan *et al.*, pl'ffs in error, *vs.* Frederick Eggers. Affidavits of value on the part of the plaintiffs in error.

[Stamped:] Office Supreme Court U. S. Filed Mar. 19, 1888. James H. McKenney, clerk.

124-85

In the Supreme Court

of the United States.

ATTERSON W. RUCKER,
Plaintiff in Error,
vs.
JEROME B. WHEELER,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

A. W. RUCKER,
In Pro. Per.

WHIPPLE & PIERSON, PRINTERS, 1320-26 17TH ST., DENVER, COLO.

In the Supreme Court

of the United States.

ATTERSON W. RUCKER,
Plaintiff in Error,
vs.
JEROME B. WHEELER,
Defendant in Error.

STATEMENT OF CASE.

The action was brought upon two distinct and separate causes. The first cause of action was for services rendered in the purchase of property. The contract relied upon was entered into between the plaintiff and certain persons other than the defendant, and the issue presented was whether these persons were the agents of defendant. The purchase was finally made direct by the defendant, and upon this the question is as to whether the plaintiff opened negotiations which led to the bringing of the parties together in such manner as to make the defendant liable for the services of plaintiff.

As to the second cause of action, it appears that on November 29, 1882, Henry Webber owned 20–60 of the Emma mine. On April 14, 1883, Archie C. Fisk, who owned 28–60 of this property, commenced proceedings to

forfeit the interest of said Webber for non-payment of an assessment for annual labor performed by said Fisk for the year 1882. During this time the other 12–60 of the mine was owned by Charles F. Abbey. After period of publication of notice Fisk claimed the Webber interest.

On November 20, 1883, Fisk leased to Abbey the 48–60 owned and claimed by him, and on November 26, 1883, said Webber, through and in the name of one Nevett, procured from Abbey a lease upon 16–60 of the mine. On April 18, 1884, the defendant, through divers mesne conveyances, became the owner of the interest of Fisk. In April, 1884, Webber brought an action against Abbey and the grantor of defendant to recover the interest formerly owned by him. On April 28, 1884, Webber, by quit-claim deed, conveyed 5–60 of said mine to plaintiff. And some time in 1884 one Kinkade, representative of the heir-at-law of Abbey, brought an action for possession and injunction against Nevett. Sometime prior to September 26, 1884, the defendant purchased the entire interest of Abbey.

On September 26, 1884, an agreement was entered into, by which all of said actions were dismissed, and the title of Webber to 15–60 of the mine was recognized and confirmed by a quit-claim deed from defendant. By this agreement Nevett retained a one-third interest in the lease, and, of the ore on hand, Nevett was to have one-third less a royalty, the defendant three-fourths of the other two-thirds, and Webber, or his grantees or assigns, the other one-quarter of the two-thirds. The proceeds of the mine during the life of the lease, which was to November 20, 1884, were to be divided in the same way. This division was to include the royalty to be paid by Nevett.

On October 21, 1884, the defendant purchased the interest of Nevett in said lease and agreement. On November 17, 1884, Webber sold 10–60 to his wife, and on No-

vember 22, 1884, she conveyed the same to defendant, together with all claim for profits earned during the five days which she owned the interest.

The plaintiff was paid the amount due upon his interest, less his proportionate burden of the one-third interest in the lease retained by Nevett, but he now claims that, by virtue of his deed from Webber, and, also, by virtue of an understanding he had with Webber at the time the deed was executed, he is entitled to hold his interest free and clear from the burden of that lease.

The only facts in dispute are as to whether, at the time Webber deeded to plaintiff, it was understood that plaintiff's interest should be free from the lease held by Nevett for Webber, and whether, at the time of making the agreement of September 26, 1884, or the purchase of November 22, 1884, the defendant knew that Webber owned the lease held by Nevett, and had conveyed to plaintiff free from the same.

The second count of the complaint is framed upon two theories: First, that the deed to plaintiff operated to convey an interest unincumbered by the Nevett lease; and, second, that he was entitled to such unincumbered interest by virtue of said parol agreement.

The Court refused all instructions asked upon the first theory, and, in its charge to the jury, denied the plaintiff all benefit therefrom, and submitted the whole case upon the issue of fact respecting the parol agreement.

The deed under which plaintiff claims is as follows: "This indenture, made the 28th day of April, in the year of our Lord one thousand eight hundred and eighty-four, between Henry Webber, of Pitkin county and State of Colorado, party of the first part, and A. W. Rucker, of the County of Lake and state of Colorado, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of $1.00, lawful money

of the United States of America, to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, release and forever quit-claim unto the said party of the second part and his heirs and assigns an undivided one-twelfth interest in and to the Emma lode mining claim, situated on Aspen mountain, adjoining the Vallejo lode mining claim, in Roaring Fork mining district, in Pitkin county, Colorado, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns, forever.

"In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written. HENRY WEBBER. [SEAL]"

(Record 21–22)

While the consideration recited in this deed was nominal, the undisputed fact is that it was executed upon the further consideration of legal services, rendered and to be rendered, by plaintiff.

It was stipulated and agreed by the parties to the action that if plaintiff's interest was not subject to the Nevett lease, then he was entitled to recover the amount claimed

in the second count. If, therefore, he was entitled to hold his interest free from this lease, either by virtue of his deed, or by virtue of an independent contract, there is no controversy as to the amount due. (Record 22.)

It was also stipulated that Devereaux was the general agent of the defendant at Aspen. (Record 22.)

The statutes hereinafter referred to are as follows:

"If any person shall sell and convey to another, by deed or conveyance purporting to convey an estate in fee simple absolute, any tract of land or real estate lying and being in this State, not being possessed of the legal estate or interest therein at the time of the sale and conveyance, and after such sale and conveyance the vendor shall become possessed of, and confirmed in, the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." (Genl. Stat. 1883 page 171 Sec. 4.)

"Any person claiming right or title to lands, tenements or hereditaments, although he, she or they may be out of possession, and notwithstanding there may be an adverse possession thereof, may sell, convey and transfer his or her interest in and to the same in as full and complete a manner as if he or she were in the actual possession of the lands and premises intended to be conveyed." (Id. Sec. 5.)

"Every estate in lands which shall be granted, conveyed or demised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to be granted, devised or conveyed by operation of law." (Id. page 172 Sec. 7.)

"All conveyances of real estate, and of any interest therein, duly executed and delivered, shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for possession is therein specified." (Id. Sec. 9.)

The instructions asked by the plaintiff and refused by the Court were as follows:

1. The Court instructs the jury that if they believe from the evidence that the assignment of the lease of a portion of the Emma lode which was made by Abbey to Nevitt was made for the use and benefit of Henry Webber, and was made prior to April 28th, 1884, when the plaintiff took his deed to one-twelfth of said lode from said Henry Webber, then from the date of such assignment to Nevitt the lesser estate, to wit, the leasehold right, was merged in Henry Webber, and the said Rucker took his interest free and clear of the incumbrance of the lease, and he is entitled to the amount of money named in the stipulation read in your hearing and interest at the rate of ten per cent. per year from the date of the commencement of the suit, which was August 24th, 1885.

2. The Court is asked to instruct the jury that if they believe from the evidence that the lease of a portion of the lode, though made nominally to Nevitt, was in fact owned by Henry Webber, and that the same Webber sold and conveyed a one-twelfth interest to the plaintiff after the making and delivery of the lease, and if they also believe from the evidence that at the time of the execution of the deed from Webber to plaintiff it was mutually agreed between Webber and plaintiff that this one-twelfth should be exempt from the operation of said lease, then plaintiff is entitled to the proceeds of the one-twelfth, and upon these facts they should find for the plaintiff to the amount fixed by the stipulation of the parties read to the

jury and interest at the rate of ten per cent. per year from August 24th, 1885, the date the suit was brought.

3. The Court is asked to instruct the jury that under the pleadings of the defendant in this case the jury must find that the deed made by the defendant to Henry Webber of an undivided one-fourth of the Emma lode in accordance with the settlement of September 26th, 1884, enured and was intended to enure to the benefit of the plaintiff, and as there is no limit placed in the pleadings as to the extent to which it thus enured, the jury must find it extended to the full extent the ownership of the estate could be affected by the acquisition of the leasehold interest therein subsequent to such deed, and in this view the plaintiff is entitled to take the whole proceeds of the one-twelfth free from the lease.

4. The Court is asked to instruct the jury that if they believe from the evidence that, at the time of the making and delivery of the lease to Nevitt, Webber was the real owner thereof, then he owned the legal title to the one-twelfth, and the interest in the lease being in Webber worked a merger or extinction of the lease to that extent between said Webber and his grantee, the plaintiff in this cause, whether any mention was or was not made of the lease at the time the deed to the one-twelfth was executed by Webber to plaintiff.

5. The Court is asked to instruct the jury that if they believe from the evidence that in making the contract made between Devereux and Rucker as to purchasing the Webber interest was made for the benefit of Mr. Wheeler, and that Devereux was authorized to make such a contract, and that in procuring such purchase said Rucker was the procuring and direct cause by which the sale was effected, then plaintiff is entitled to recover the price agreed on, and that in determining whether said Dever-

eux was or was not authorized to thus contract the jury must take into consideration all the facts and circumstances shown in evidence, and they are not bound by the evidence of the defendant on that point if from the facts and circumstances they believe that said Devereux was thus authorized.

6. The Court is asked to instruct the jury, if they believe from the evidence that the agreement testified to by Rucker, Judkins and Devereux as to the plaintiff's compensation for the procuring the said Henry Webber to sell his wife's interest in the Emma lode was made with said Judkins and Devereux, and that at that time the said Devereux was authorized to purchase mining property for his principal and in his name, and that in making such agreement he was acting for his principal, said Wheeler, and that said Wheeler, anticipating such sale to Judkins and Devereux for him as aforesaid, whether he had or had not notice of the agreement, prevented the completion of such agreement by said Judkins and Devereux by purchasing the whole of Webber's interest for himself, and if they further believe that said Webber was induced to apply and sell said property to said Wheeler by reason of the efforts of the said plaintiff, then said plaintiff is entitled to recover such sum as had been agreed upon in case a purchase should be effected at one or other of the sums named in said agreement as the purchase price.

The Court is asked to instruct the jury that by virtue of the deed from Webber to plaintiff he became entitled to one-twelfth of the proceeds of the mine from the date thereof, provided the evidence establishes that the leasehold estate was the property of said Webber; and, further, that even should they find that said leasehold estate was not the property of Webber, yet the plaintiff would be entitled to recover one-twelfth of the proceeds

of said mine after the conveyance by defendant to Webber, said deed from Webber to plaintiff being made good by such deed from defendant to Webber, and the said Webber having by such conveyance from the defendant sufficient estate to satisfy the conveyance to plaintiff. (Record 27–29).

The assignment of errors is as follows:

And now, before the justices of the Supreme Court of the United States, comes the said Atterson W. Rucker, plaintiff in error, and says that in the record of proceedings in said cause there is manifest error in this, to wit:

First—That the Court erred in admitting the testimony of Henry Webber upon cross-examination in answer to the question, "What understanding had you up to the time of this conversation as to whether plaintiff's interest was subject to payment of royalty under the lease?" to which question witness answered as follows: "My understanding, both before and after that time, was that plaintiff's interest was subject to the lease." (Original record pp. 70–71.

Second—In the statement made by the Court to the jury during the argument of L. J. Laws, attorney for plaintiff, and the reproof administered by the Court to said Laws during said argument in the presence of the jury. (Pp. 84–85.)

Third—That the Court refused to charge the jury as prayed by the plaintiff in error in the first, second, third, fourth, fifth and sixth instructions asked by plaintiff in error. (Pp. 85–86.)

Fourth—The Court refused to charge the jury as prayed for by plaintiff in error in language as follows: "The Court is asked to instruct the jury that by virtue of the deed from Webber to plaintiff he became entitled to one-

twelfth of the proceeds of the mine from the date thereof, provided the evidence establishes that the leasehold estate was the property of Webber; and, further, that even should they find that said leasehold estate was not the property of Webber, yet the plaintiff would be entitled to recover one-twelfth of the proceeds of said mine after the conveyance from defendant to Webber, said deed from Webber to plaintiff being made good by such deed from defendant to Webber, and the said Webber having by such conveyance from the defendant sufficient estate to satisfy the conveyance to plaintiff." (P. 88.)

Fifth—That the Court, in its instructions to the jury, charged in language as follows: "The plaintiff states two causes of action, gentlemen. The first is for services rendered by him in purchasing the interest of Julia Webber in the Emma lode mining claim for the defendant. Upon that cause of action his position is that he was employed by Mr. Wheeler, the defendant, to make this purchase for him, and the first matter for your consideration is whether there was any such employment. On that point I do not understand there is much conflict of testimony —that is, Mr. Rucker, the plaintiff, agrees in his statement substantially with what is said by Mr. Judkins and Mr. Devereux in respect to that matter. Mr. Judkins, having a scheme for purchasing this property, or a part at least, upon his own account, hoping to get some one to share in the purchase with him, if he should be able to make it, opened negotiations with Mr. Webber through the plaintiff, and after these negotiations had been carried on for some time he went to Mr. Devereux and laid the matter before him. Mr. Devereux became interested in the matter, and thought that he would be willing to continue the negotiations or join with Mr. Judkins in the purchase, if it could be made, either for himself or on behalf of his principal, Mr. Wheeler. In so far he ap-

proved and agreed to adopt for himself or for Mr. Wheeler, perhaps, if the negotiations should be carried through on his part, what had taken place between Mr. Judkins and Mr. Rucker up to that time, and so far as the proceedings between Mr. Rucker and Mr. Judkins affect matters in issue in this suit, there was a promise on the part of Mr. Judkins to pay Mr. Rucker ten thousand dollars if this sale should be acccomplished for the consideration of forty thousand dollars, and if a greater sum should be paid for the property, then five thousand dollars. Now, I have to say that on the cause of action as stated here, in order to establish any right on the part of the plaintift to the commission for which he sues in making a sale the proof must be of a sale to the defendant and an agreement for a sale to be made to the defendant and not a sale to Judkins and Devereux, not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission, and whoever would purchase under that agreement with Judkins would pay the commission—that is to say, Judkins and Devereux, if they purchase, Devereux acting on his own behalf, Judkins and the defendant, if they purchase jointly, would pay it. If some other man was brought into the purchase—some one not named at that time or referred to in any way—then it would be that other man and Judkins who would pay the plaintiff the commission. Furthermore, it does not appear—in fact the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other, and, of course, an agreement by Devereux on behalf of the defendant to purchase this property would not be binding on the defendant unless afterwards, with full knowledge of the situation and circumstances

and of what had been done by Devereux in his behalf, he should ratify and confirm what had been done by Devereux. I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff. I say now generally upon this branch of the case that it must appear to you from the evidence that there was an agreement between the plaintiff and defendant, Mr. Rucker and Mr. Wheeler, to the effect that Mr. Rucker was to secure this property for him and that he was to pay him for that service. The agreement, which appears to be stated by Judkins and by Devereux, is not of that character—that is, that was an agreement that Judkins should purchase with somebody else, and of course Judkins would be chargeable with the commission if it was carried out. If you can find anything in the evidence to support the conclusion that the defendant made an agreement with plaintiff to pay this commission, and that the property was afterwards purchased by him in pursuance of that agreement, then the plaintiff is entitled to recover; otherwise, he is not entitled to recover. So much for that cause of action.

Sixth—That the Court, in its instructions to the jury, charged in language as follows: "We now come to the second cause of action, which is not so easily understood. It seems that in November, 1883, Mr. Fisk, who claimed to be the owner of 48-60ths of this mine, leased to Mr. Abbey (who claimed to own the other 12-60ths), the 48-60ths which he, Fisk, owned, and Mr. Abbey assigned to Nevitt 16-60ths of his interest in the 48-60ths which he had received from Fisk. Nevitt commenced work under that assignment. He was to do something towards developing the property in consideration of this assignment to him, and, in some way which is not explained in the evidence fully, though it has been explained by counsel,

he came to claim a right to carry on the mine during the term of this lease entirely—that is, as to all the interest involved in it. I believe this claim was asserted by him in 1884. It is said, and it appears to be conceded on both sides, that Nevitt represented Mr. Webber in this lease, and that whatever he was doing upon this claim was for the benefit of Mr. Webber. Mr. Webber, who claimed to own one-third, or 20-60ths, of the mine, in that month, April, 1884, brought a suit to recover this 20-60ths. He seemed to have held the original title to this 20-60ths. Fisk, in the preceding year, had instituted proceedings against him under section 2324, of the Revised Statutes, to acquire his interest from failure to do the annual work for 1882, so that a controversy had arisen between him and Fisk, and, of course, between those who should claim under Fisk under this lease with Abbey and Nevitt, in respect to this one-third interest in the mine. He brought this suit and employed the plaintiff here as his counsel in it. On the 28th of April, 1884, he conveyed to the plaintiff one-fourth of his interest, which was 5-60ths or 1-12th, assuming that he owned 20-60ths of the mine, 1-12th of the whole mine, to pay him for his services in this suit. Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed or quit-claim of 5-60ths in the mine was given. On the 26th of September following, that same year, Wheeler, Nevitt and Webber made the agreement which has been read here several times, by which they settled this controversy which had arisen between Webber and the others in respect to this 20-60ths, and assumed to settle all the matters pending between them in respect to this property. In that agreement it was stated that Mr. Webber was the owner of one-fourth; that was 5-60ths less than he had claimed in the first instance; one-fourth would be 15-60ths. They referred to this suit which had

been brought in the April preceding by Mr. Rucker, the plaintiff here, in behalf of Mr. Webber: "Whereas the said party of the first part (that is Wheeler,) is the owner of certain interests in the Emma mine, situated in Pitkin county, State of Colorado, and a suit is now pending in the District Court of said county in behalf of said Webber against said party of the first part, and others, for a one-third interest in said mine," and then reference is made to a suit brought by Wheeler against Nevitt, involving the title to the mine in some way, and they referred to the lease: "And whereas said parties being desirous of compromising and settling said actions, it is agreed, in consideration of the premises, the said first party will, upon the ensealing of these presents, make, execute and deliver a sufficient deed of quit-claim to said Webber, his grantees or assigns, for an undivided one-fourth interest in said mine, and said Webber, on the receipt of said deed, agrees to release and waive, and does hereby release and waive, to said party of the first part, all claims which he may have to any further or other interest in said property." So that, upon that, it must be assumed that at the time of the making of the deed, the 28th of April, 1884, to the plaintiff in this suit, Mr. Webber owned a one-fourth interest in the property, or 15-60ths, and of that he conveyed 5-60ths to the plaintiff. Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to the plaintiff in respect to the lease which was then subsisting, or, at all events, which was being carried on by Nevitt at that time, of this property, and subsequently, and which was perpetuated and recognized by this agreement of the 26th of September, 1884, the question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to take a 5-60th or a one-twelfth of the proceeds of the property under the lease, or

whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration. In this agreement the interests of the several parties in the proceeds of this lease are expressed—that is, the amount which Wheeler should have, the amount which Webber should have, and the amount which Nevitt should have. In this instance at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only an agent for Webber in it, the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in the agreement with respect to the lease. "And the said second party (that is, Nevitt) hereby releases and waives to said first party all right and title as to said lease, save and except a one-third interest therein, and at the end of said term releases and surrenders the whole thereof and possession thereunder peaceably to the owners of said property, their grantees or assigns." It is further agreed "that the proceeds of the ore now on hand, after payment of the cost of production, and after payment of the cost of hauling and treatment, shall be divided as follows: Said party of the second part (Nevitt) to receive one-third, less a royalty of fifteen per cent. of said one-third interest, according to the terms set forth in said lease, and said party of the first part to receive three-fourths of the remaining two-thirds;" that would be 30-60ths, or one-half. "And the said Webber (Webber being recognized distinctly from Nevitt in this agreement), his grantees or assigns, one-fourth of the said remaining two-thirds," which would be 10-60ths or one-sixth of the whole, and during the remainder of the term of said lease, namely, up to and inclusive of the 20th of November, 1884, the proceeds of the mine to be divided in the same manner and

in the same proportion as aforesaid, such division also to apply to and include the said royalty to be paid by said second party aforesaid. Now, the position of the plaintiff is that he comes in under the designation of a grantee or assignee of Webber for one-half of the amount reserved to Webber by this agreement—that is, 5-60ths; this agreement reserves to Webber 10-60ths; and the position of the plaintiff is that he must be regarded as an assignee and grantee of Webber in virtue of his deed of the preceding April for half of that amount which was reserved to Webber. He has brought this suit to recover that. Now, as I said before, in the deed there is nothing about that, and the question is, What was the intention of the parties at the time this deed was made? The plaintiff testifies that it was their intention that he should have the interest accruing under this lease as it went along and was not to be postponed to the lease. I understand Mr. Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Mr. Webber's testimony—whether he has denied it or not. Mr. Webber could, if he chose to, by the terms of the agreement, reserve this entire interest to himself—that is, all that was accruing under the lease, if it was his intention to keep it to himself, and there was no agreement of the parties in respect to it—the deed constitutes no agreement. He could reserve it to himself, and if he did reserve it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to the plaintiff, then it would go to Webber, and under these circumstances it remained in him up to the time he made the sale to the defendant in this case. After the agreement of September 26, and some time in October, Nevitt sold, as you remember, through the negotiations of Judkins, to Mr. Devereux or to the defendant directly—I don't remember much about that transaction

—and subsequently Mrs. Webber, in a conveyance which she made to the defendant, assumed to convey all right and interest accruing to her under the lease. Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of it, 1-12th, 5-60ths of the whole amount; and if Nevitt was taking the whole of the proceeds of the mine—I believe he was, at least it seems that he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine, nothing that could be divided amongst them—among the several parties, until that time, and nothing was, in fact, divided until after this agreement of the 26th of September was made; so that the question must be whether there was an agreement between the plaintiff and defendant or between plaintiff or Webber that he should be entitled to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration. If you find that there was such an agreement, that the parties understood and intended that Mr. Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from after the time of the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties. They have agreed upon the amount. In the absence of such an agreement he is not entitled to recover.

Seventh—The Court, in its instructions to the jury upon the first cause of action, charged in language as follows: "In order to establish any right upon the part of plaintiff to the commission for which he sues in making

the sale, the proof must be of a sale made to the defendant and an agreement for a sale to be made to the defendant, not a sale to Judkins and Devereux; not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission, and whoever would purchase under that agreement would pay the commission—that is to say, Judkins and Devereux, if they purchased, Devereux acting on his own behalf, Judkins and the defendant, if they purchased jointly, would pay. If some other man was brought into the purchase—some one not named at the time or referred to in any manner —then it would be that other man and Judkins who would pay the commission."

Eighth—That the Court in its instructions to the jury charged in language as follows: Furthermore, it does not appear, in fact, the evidence tends to prove that Devereux had no authority from Wheeler at the time, to make any purchase of this property or any other. * * * I do not see that his evidence proves, taking all that is said about it by these witnesses, a contract on behalf of defendant to purchase this property through the plaintiff. * * * That it must appear to you from the evidence that there was an agreement between plaintiff and defendant Rucker and Wheeler to the effect that Rucker was to secure this property for him, and that he was to pay him for his services. The agreement which appears to be stated by Judkins and Devereux is not of that character.

Ninth—That the Court in its instructions to the jury upon the second cause of action charged in language as follows: Nevitt commenced work under that assignment. He was to do something towards developing the property

in consideration of this assignment to him, and in some way, which is not explained in the evidence fully, though it has been explained by counsel, he came to claim a right to carry on the mine during the term of this lease entirely—that is, as to all the interests involved in it. I believe this claim was asserted by him in 1884. * * * * Nothing was said in this conveyance about the lease under which Nevitt was carrying on the work. A general deed of quit-claim for 5-60ths in the mine was given. * * * Now, upon the settlement and adjustment which was made on the 26th of September, nothing having been said in the conveyance to plaintiff in respect to the lease which was then subsisting, or at all events which was being carried on by Nevitt at that time on this property and subsequently, and which was perpetuated and recognized by this agreement of the 26th of September, 1884, the question is whether the plaintiff acquired any interest under the lease—that is, whether he was entitled to the 5–60ths or 1–12 of the proceeds of the property under the lease or whether he was postponed until the expiration of that lease before he could take anything from the property. That is a question of fact for your consideration. * * * In this instance, at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only the agent of Webber in it, the parties did not carry out that suggestion, because Nevitt's interest is stated distinctly from Webber's in that agreement with respect to the lease. * * * Now, as I stated before, in the deed there is nothing about that, and the question is, What was the intention of the parties at the time this deed was made? The plaintiff testifies that it was their intention that he should have the interest accruing under this lease as it went along, and was not to be postponed to the lease. I

understand Webber to deny that proposition. Some comments have occurred between counsel as to the meaning of Webber's testimony—whether he has denied it or not. Webber could, if he chose to, by the terms of the agreement, have reserved this entire interest to himself—that is, all that was accruing under the lease. If it was the intention to keep it to himself, and there is no agreement of the parties in respect to it—the deed constitutes no agreement—he could reserve it to himself; and if he had reserved it to himself, if nothing was said about it at that time, in the absence of any agreement between them that it should go to plaintiff, then it would go to Webber, and under those circumstances it remained in him at the time he made the sale to defendant in this case. * * * Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become affected at once upon the execution of the deed and that he should be entitled to whatever should come under the lease to Webber—that is, to his part of 1–12th or 5–60ths of the whole amount. If Nevitt was taking the whole proceeds of the mine—I believe he was; at least it seems he did so or assumed the right to do so after the mine became fruitful, and that was only in August, I think, of the same year—there were no proceeds of the mine, nothing that could be divided among them—among the several parties—until that time, and nothing was, in fact, divided until this agreement of the 26th of September was made; so that the question must be whether there was an agreement between plaintiff and defendant or between plaintiff and Webber that he should be entitled to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration. * * * If you find there was such an agreement, that the parties understood and intended that Rucker should

be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed from and after the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in this stipulation between the parties. * * * In the absence of such an agreement, then he is not entitled to recover.

Ninth—That the Court erred in overruling the motion for a new trial in the cause. (Record 39–46.)

BRIEF FOR PLAINTIFF IN ERROR.

Our statute provides that every estate in lands which shall be granted or conveyed to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words. (Gen'l Stat. 1883, page 172, section 7.) And such a conveyance carries with it the right to immediate possession (*Id.* section 9), and operates to convey an after acquired title (*Id.* page 171, section 4). And it will have this effect irrespective of the actual possession of the property. (*Id.* section 5.)

While the complaint describes the deed under which plaintiff claims as a quit-claim deed, it is obvious that, under our legislation, it is much more than a mere quit-claim deed. (Sibley v. Bullis 40 Iowa 429; Wilson v. Irish 62 Iowa 260; Cutler v. James 64 Wis. 173; 54 Amer. Rep. 603; Touchard v. Crow 20 Cal. 150.) It contains words of present grant which could only be qualified by other terms of the deed or by some contemporaneous written agreement. (Chapman v. Glassel 13 Ala. 50; 48 Amer. Dec. 41 and note.) Such a deed passes the fee as effectually as one with covenants of warranty. (Brown v. Banner etc. 97 Ill. 214; 37 Amer. Rep. 105;

Green Bay etc. v. Hewett 55 Wis. 96; 42 Amer. Rep. 701; Fox v. Hall 74 Mo. 315; 41 Amer. Rep. 316; Holland v. Rogers 33 Ark. 251; Hanks v. Folsom, 11 Lea 555; Tremmel v. Kleiboldt 6 Mo. App. 549; Platt v. Brown 30 Conn. 336; Kerr v. Freeman 33 Miss. 292.) It undertakes to convey, not merely the right, title and interest of the grantor in the property, but the property itself.

Under our legislation, however, a mere quit-claim deed conveys all the interest, legal or equitable, held by the grantor at the time. (Bradbury v. Davis 5 Colo. 265.) At the time of executing the deed to plaintiff the grantor had at least an equitable title which was confirmed by the subsequent deed of defendant. (Irvine v. Irvine 9 Wall. 617; Frost v. Missionary Society 56 Mich. 62; Welch v. Dutton 79 Ill. 465; Touchard v. Crow 20 Cal. 150; Farmers Loan and Trust Co. v. McKenny 6 McLean 1.) And title derived from such subsequent deed would pass, by relation, as of the date of the deed to plaintiff. (Landes v. Brandt 10 How. 370; Touchard v. Crow 20 Cal. 150; Dutton v. Welch 79 Ill. 465; Lessee v. Spencer 21 How. 228.)

The Court charged the jury upon the theory that, at the time plaintiff secured his deed, his grantor was the owner of one-fourth of the property, but it is wholly immaterial whether it be considered that he was the legal owner at the time of the conveyance, or whether he acquired the title by the subsequent deed from defendant, for in either case the title passed to plaintiff.

It was practically conceded upon the trial, and the Court charged the jury upon the hypothesis, that the interest retained by Nevitt in the lease in question was really owned by the grantor of plaintiff at the time of the conveyance to plaintiff. The result is, then, that at the time of the conveyance the grantor owned the legal title to a one-fourth of the property and a leasehold in-

terest to a sixteen-sixtieths interest therein. The question arises, then, as to what interest passed by this deed to plaintiff. Did the plaintiff take his interest, with a right to immediate possession, as against the Nevitt lease, as adjusted by the compromise agreement of September 26, 1884, irrespective of any parol agreement? If so, the Court committed error in its charge to the jury.

On the question as to whether the deed to plaintiff conveyed an interest in the lease held by his grantor in the name of Nevett, and as to whether such grantor would be required, out of the estate confirmed in him by the deed of defendant, executed in accordance with the agreement of September 26, 1884, to relinquish an unincumbered interest commensurate to that which he had undertaken to convey, the Court charged that "the deed constitutes no agreement," and that if no parol agreement was made the plaintiff would take his interest subject to the lease. In other words, the legal proposition is asserted that the plaintiff takes nothing by his deed, except that which was accorded by a separate parol agreement. If this is a correct construction of the charge of the Court, then every principle of law applicable to the subject was violated.

Instead of requiring that the interest to be taken by plaintiff under his deed should be ascertained by a parol agreement, the correct principle is that evidence of a parol agreement cannot be introduced to change the terms and effect of the deed. In Drake v. Root (2 Colo. 685) it was held that, upon the statute (Genl. Stat. 1883 page 172 Sec. 9) and upon common law principles, a grantor would not be allowed to show by parol evidence, as against his deed, that he was to retain possession for a given time after the delivery of his deed. This case is in harmony with general and familiar principles.

If Webber owned the lease held by Nevett, then certainly a proportionate interest therein was conveyed by

his deed to plaintiff. If he did not own the same, then the estate confirmed in him by the settlement of September 26, 1885, and the deed of defendant, was ample to satisfy the incumbrance of the lease and the prior deed to plaintiff. But the Court proceeded upon the theory, both in its charge to the jury and in its refusal to charge as prayed by plaintiff, that the interest conveyed by the deed, and the right to possession under the deed, were subject to the leasehold interest held by Webber and the incumbrance of the lease held by Nevett, if the lease in question was owned by Nevett and not by Webber, unless there was a parol agreement to the contrary. This was equivalent to holding, not only that a grantor could reserve possession by parol agreement, but that he could always retain possession, unless he had made an agreement, separate from his deed, that possession should go with the deed.

As we have seen before, the grantor of plaintiff, at the time he executed his deed, held a leasehold interest in the name of Nevitt; but, irrespective of this, he had confirmed in him a one-fourth interest in the entire property, subject to the burden of a lease upon a one-third interest therein. This lease would cover one-third of his estate, leaving him with a ten-sixtieths interest unencumbered by the lease and five-sixtieths encumbered thereby. The theory of the Court was that the plaintiff would take a five-sixtieths which was encumbered by the lease, rather than five-sixtieths out of the ten-sixtieths which was free from the lease, unless there was a parol agreement to the contrary. We scarcely know how to discuss so absurd a proposition.

When a person undertakes to grant, even by a quit-claim deed, a definite interest in real estate, and owns the interest, or subsequently acquires the same, upon equities that he already held, it passes to his grantee notwith-

standing the fact that he may have granted other distinct interests, or placed encumbrances upon other distinct interests, provided he has estate sufficient to satisfy them all. The application of this principle to the facts of this case is decisive of the controversy. The grantor of plaintiff had confirmed in him by the settlement in question an undivided one-fourth interest in this mine. One-third of this interest was subject to a lease and two-thirds thereof were free from the lease. The one-fourth interest was equivalent to a three-twelfths interest, one-twelfth being leased. Suppose he had, upon the execution of this contract of settlement, conveyed one-twelfth to A., afterwards another twelfth to B., and still later the remaining twelfth to C., would there be any doubt but that A. and B. would have taken their interests free from the lease, and that the leasehold interest would be entirely carved out of the interest of C.? We think that this question scarcely admits of discussion.

A deed is to be construed most strongly against the grantor, and this rule applies with peculiar force where it is sought to withhold something from the grant. (Grubb vs. Grubb 101 Pa. St. 11; Monmouth vs. Plympton 77 Maine 556; Zittle vs. Weller 63 Md. 190.) As to the deed in question there is no doubt or ambiguity. Under our statute the word "granted" or "conveyed" in a deed conveys a fee simple estate of inheritance unless a *less estate be limited by express words.* No attempt is made to express any limitation upon the estate which was conveyed by this deed.

The practical effect of the ruling of the Court was to deny to plaintiff the right of immediate possession of the estate granted to him, and postpone his possession and right of possession to a future day. This was a plain violation of the statute of this State, that declares that all conveyances of real estate, and of any interest therein,

duly executed and delivered, shall be held to carry with them the right to immediate possession of the premises or interest conveyed, unless a future day for the possession is therein specified. (Genl' Stat. 1883 page 172 Sec. 9.) The Court required the possession (for rents and profits represent the right of possession) of plaintiff to commence after the expiration of a leasehold estate, and this notwithstanding the fact that his grantor had ample estate to satisfy both the lease and the grant to plaintiff.

The deed in question not only contained no limitation as to the right of possession, but expressly conveyed the grantor's right to immediate possession. The right of possession was not only expressly conveyed, but all the metals, ores, gold and silver bearing quartz and earth, were expressly *granted, bargained and sold* to the plaintiff. It is idle to attempt to reconcile the terms of this conveyance with a reservation of the right to withhold possession, and the right to extract ore from this interest, during the period of a lease.

There is not only no claim that anything appears upon the face of the deed giving countenance to any such reservation, but there is no pretence either in the pleadings, evidence or charge of the Court, that any attempt was made to create any limitation by a parol understanding. The theory of the Court was that there had to be a parol agreement that the immediate possession of the interest, and the ores belonging thereto, should pass with the deed, otherwise they would not pass, notwithstanding they were expressly mentioned in the deed.

There has been no suggestion that the action was not sufficiently predicated upon the deed, and it is clear that it was. All that is alleged respecting a parol agreement could be stricken out of the complaint and a good cause of action, in respect to rights accruing under the deed, would remain. If it can be said that two causes of action

are improperly blended in one count, the objection, not having been taken by a motion to require the plaintiff to elect upon which he would proceed, is waived. (Otis vs. Mechanic's Bank, 35 Mo., 128; Bass vs. Comstock, 36 How. Pr., 382; Same vs. Same, 38 N. Y., 21).

As to the cause of action stated in the first count, it is submitted that the Court went too far in the expression of an opinion upon the evidence, and that this practically had the effect of taking the case from the jury. It is certain that Judkins, Devereux and the plaintiff were all negotiating with the view of placing the property with the defendant. While these negotiations were pending Webber suddenly disappeared from Aspen and appeared in New York and negotiated directly and successfully for a sale of the property. We think that, in view of the relations subsisting between Devereux and the defendant, it should have been submitted to the jury, under proper instructions, as to whether the services of the plaintiff did not result in the bringing together of Webber and the defendant to such an extent as to make the latter liable therefor.

A. W. RUCKER,
In Pro. Per.

27-85

In the Supreme Court

of the United States.

OCTOBER TERM, A. D. 1887.

ATTERSON W. RUCKER, Plaintiff in Error, vs. JEROME B. WHEELER, Defendant in Error.	Error to the Circuit Court in and for the District of Colorado.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

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OCTOBER TERM, A. D. 1887.

ATTERSON W. RUCKER, Plaintiff in Error, vs. JEROME B. WHEELER, Defendant in Error.	Error to the Circuit Court in and for the District of Colorado.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

On the 24th day of August, 1885, the plaintiff in error began his suit against the defendant in error, and claimed that the latter was indebted to him in the sum of twelve thousand, two hundred and fifty dollars. By the first count of his original complaint he alleges that he was employed by the defendant to render services in and about effecting the purchase from one Julia Webber of her interest in the Emma Lode mining claim, for which he was to receive the sum of five thousand dollars. By the second count he alleges that the defendant received from the Emma mining claim the sum of $7,250.00 for the use and benefit of the plaintiff, which, upon demand, he refused

to pay. A demurrer was interposed to this complaint and sustained; shortly after which the plaintiff filed an amended one, which was more elaborate than the first, and which more clearly outlined the character of his claim. In that complaint he substantially alleged that he was employed by the defendant to secure for the defendant from Julia Webber, her interest in the Emma mine, and was to receive ten thousand dollars if he could induce Mrs. Webber to sell the interest for less than fifty thousand dollars, and five thousand dollars provided the price was greater; that he finally induced her to sell for fifty-five thousand dollars, in consequence of which the defendant became indebted to the plaintiff in the sum of five thousand dollars. By his second count he alleged, in substance, that the plaintiff was indebted to him in the sum of seventy-five hundred dollars, being the amount of money taken by the defendant from plaintiff's interest in the Emma mine, and which he refused to pay over upon demand. The defendant answered denying both counts of the first amended complaint, and as to the second one, alleged in substance that plaintiff obtained his interest in the mine from one Henry Webber, who, at the time, claimed to be the owner of an undivided one-third of the Emma mine, and who gave to the plaintiff a one-twelfth interest therein as a fee for protecting his title and defending him against all litigation; that subsequently, and in September, 1884 the defendant and Webber had a settlement of their said litigation, in which settlement was included a lease then claimed upon the premises by one Carey Nevitt, and that in consideration that the defendant would deed and convey to Webber, by quit-claim deed, one-fourth interest in the mine and allow the Webber lease to remain in full force, to the extent of one-third of the proceeds of the mine until it expired by limitation, the said Webber would waive further claim

or demand against the defendant as to the said one-third interest; that it was provided in said agreement that the proceeds of the mine should be divided as to two-thirds thereof—three-fourths of said two-thirds to go to the defendant, and the remaining one-fourth of said two-thirds to the said Webber, while the royalty of fifteen per cent. derived from the lease of the other one-third should be divided in the same manner and in the same proportions. That in the negotiations which resulted in said agreement the plaintiff was the attorney, both of Webber and of Nevitt, read and considered the instrument of settlement, it having been signed by his clients only after his approval; that the one-twelfth interest claimed by him in said mine was made good by virtue of said settlement, and that inasmuch as the said lease to the extent of one-third constituted a common burden upon the mine and its owners in proportion to their respective holdings, the said one-twelfth interest of plaintiff was subject to the lease as well as the remainder of said mine, and that the amount claimed to be due from the defendant to the plaintiff was the amount which the said one-twelfth interest of the said plaintiff was required to contribute towards the burden of such lease during its life. The plaintiff replied to said answer, denying the truth of the defense therein set forth and asserted, in effect, that as he was not a party to the said agreement his interest could not in anywise be affected thereby.

In the month of November, 1885, the case came on for trial upon the issues so made, and it was taken from the jury by the Court. At the request of the plaintiff the jury was withdrawn, and he was given permission to file an amended complaint.

In taking the case from the jury the Court said, "The position of the parties at the time the controversy arose, so far as shown by the evidence here, was not that the

plaintiff was entitled under the distribution which is made in the agreement of September 26th, as the assignee or grantee of Webber. The position assumed is that he is entitled to this twelfth, independently of this agreement, and independently of the lease, and of all existing contracts between the parties. If he had not put himself in the position of claiming as a grantee or assignee of Webber, then of course the question would have been whether under his conveyance of April, 1884, he was entitled to stand in that position and to claim under Webber according to the terms of this agreement. Now, what I have to say upon this agreement is, that the lease having been made in November, 1883, and, as stated by the counsel for the plaintiff, Mr. Nevitt coming into that lease as assignee, and as the representative of Mr. Webber, to some extent at least, it seems that when these parties came together for the purpose of making a settlement and adjustment of the matters in difference between them, that it was understood that the lease and Mr. Webber's interest, which upon the records at all events had stood outside of the lease up to that time, were to be adjusted. In that negotiation, the plaintiff having been counsel for Mr. Webber in the suit which he had brought to establish his interest in the property, he acted as the counsel for Mr. Nevitt and Mr. Webber, and Mr. Downing acted as counsel for Mr. Wheeler. It seems to have been the understanding and agreement between these three men—Wheeler, Nevitt and Webber—that these matters should be fully settled and determined between them ; that everything should be disposed of. Upon that the plaintiff, as counsel for these two parties, Webber claiming an interest of one-third in the property, and perhaps claiming some interest under the lease which had been held, in part at least, by Nevitt, they made this agreement which was to cover the whole ground, not

only of Webber's interest in the property, but in respect to this lease; all matters in difference between these three persons were to be settled, and they came to an agreement to the effect that Mr. Webber, in virtue of his title or claim, whatever it may be, would have one-fourth of the property and get a conveyance from the defendant Wheeler; and furthermore that the ore that had been taken out by Nevitt alone, or by Nevitt and Webber under the lease, and was then in the mine, I suppose, or perhaps in the mill, some of it, should be divided in the proportions stated in the agreement between them. Not only so, but that whatever should be taken out under the lease after that time, and up to the expiration of the term, the 20th of November, 1884, should be divided in the same way; and they were very full and explicit about that."

The Court here quoted from the agreement of September 26, 1884, which will be referred to hereafter at length, and then continued:

"Now, the plaintiff having acquired his interest in this property from Webber for services rendered by him in respect to this very controversy between Webber and Wheeler, in respect to the ownership of Webber in this mine, and having taken that interest while this lease was pending, and Nevitt, who, it is said, was to some extent a representative of Webber, was in possession of the property, it may be supposed that he was there, to some extent, as the representative of Webber. He was engaged at this very time, when this agreement was drawn up, in performing a service for which he was paid by this interest in the property. Every service which he rendered in respect to this agreement was in consideration of the conveyance which had been made to him of his interest in this mine. *Now, I say that he was so far identified with his client in that respect that, whatever agreement he made in re-*

gard to this matter, it is not competent for him to come forward and say, 'I was holding from him a certain interest in this property, which I kept out.' By the terms of this agreement, which was then drawn and signed by the parties, every scintilla of interest in this mine was conveyed away. They disposed of the very proceeds, which are the subject of controversy in this suit, and he, as the representative of his client at that time, was in no position to say that there was something back and aside from this which was not embraced within its terms.

"*It was incumbent upon him, if he intended to provide for himself at that time, to do so openly and fully by the terms of the agreement.* The whole language of the contract or agreement—all that was done by the parties at the time—goes upon the presumption and hypothesis that it was a full and final and conclusive settlement and adjustment of all matters between them. How shall it be said that the attorney of either one of them—the man who was acting in the settlement, acting in arranging the terms of the settlement—preparing it in such a way that it would stand in law as a final and conclusive agreement between the parties, that he is in a position to hold something back from it, and which he may hereafter bring forward as a demand inconsistent with the provisions of the agreement itself? I do not see how that can be. It seems to me that good faith on the part of all those who were concerned in this matter at that time required that every claim and demand in respect to the matters of agreement between the parties should be brought forward and adjusted."

We have given the history of the case, rather than the history of the controversy, up to this point, because the printed record begins with the end of the first trial.

It is proper that, at this juncture, an outline of the

controversy should be stated before proceeding to the second amended complaint.

A summary of the facts antecedent to the filing of the original complaint is, in brief, that during the spring of the year 1884 the defendant Wheeler purchased from one A. C. Fisk an undivided four-fifths of the Emma mine, and subsequently secured the outstanding one-fifth thereof from one Charles A. Abbey, now deceased. Prior to the time of the sale one Henry Webber was the owner of a one-third interest in the property by purchase at a trustee's sale. Subsequently Fisk, claiming that Webber had not made his contribution for the annual expenditure upon the property, as required by section 2324 of the Revised Statutes of the United States, caused to be advertised the said interest, and no payment, as he claimed, having been made within the time required by that law, it was asserted by him that the title had passed to him under the provisions of said section. Webber, however, contending that he had made payment, brought suit in ejectment against both Fisk and Wheeler to recover the one-third interest, and made to the plaintiff a conveyance of one-fourth of his one-third, being a twelfth of the whole, as a consideration for his services to be rendered in prosecuting said suits and defending Webber's title. Before Webber brought his suits and about the 20th of November, 1883, Fisk had made a lease of his alleged four-fifths interest to Charles F. Abbey, the owner of the other one-fifth, who, in turn, had assigned to one Carey Nevitt a one-third interest in said lease, and afterwards, as Nevitt alleged, assigned the whole, including a lease upon his own one-third. Nevitt was a brother-in-law of Webber's, and it was contended that the lease was taken in Nevitt's name as the ostensible lessee, while Webber was in reality the owner, but who did not take the lease in his own name, because apprehensive that such a course would in-

volve an admission on his part of the integrity of Fisk's title.

In July, 1884, by means of a shaft sunk by Nevitt, a large body of ore was discovered within the boundaries of the claim, upon which the defendant in error applied for, and obtained the appointment of a Receiver to take charge of the premises pending the litigation. The plaintiff in error represented Nevitt and Webber in that litigation also. In September following, the defendant in error then being in Aspen, and the plaintiff in error being also on the ground, negotiations looking to a settlement were entered into, which finally culminated in the making of an agreement bearing date the 26th day of September, 1884, a copy of which said agreement is the appendix to this argument. It was the result of mutual propositions and refusals emanating from each side, and represented the only basis for a settlement upon which the parties could ultimately agree. It was attended by the execution, upon the part of the defendant in error, of a quit claim deed for an undivided one-fourth interest in the Emma mine to Henry Webber, and the surrender by Webber of any further claim to title in the property. It also provided for possession by the defendant in error of the property, who at once entered into and began work upon the same. The lease upon the one-third interest would expire on the 20th of November, 1884, by limitation. Prior to that time one W. B. Devereux, the agent of the defendant in error, through one Judkins, effected the purchase for the defendant in error, from Nevitt, of the said lease, for the sum of $24,000, and a transfer of the interest was made by Nevitt to Judkins, and by the latter to Devereux for Wheeler, on or about the 20th of October, 1884. In addition to the payment of the sum of $24,000 for the transfer, Mr. Devereux paid Judkins the sum of $2,500 for his services in obtaining the purchase

of the lease. About that time the plaintiff in error demanded one-twelfth of all the proceeds or profits of the mine, regardless of the existence of the lease, claiming that his interest should not be affected in any way by it, which demand was refused by Mr. Devereux as agent of the defendant in error, and afterwards by himself. During all these times the plaintiff in error received advances from the defendant in error upon his interest, and was paid his proportion, not only of the proceeds arising from two-thirds of the property, but also one-twelfth of the royalty due to the owners from the Nevitt lease, being fifteen per cent. of the yield from such one-third.

Shortly after the defendant in error made his quit-claim deed to Webber of the one-fourth of the Emma mine, the latter conveyed one-sixth to his wife, the remainder of the one-fourth, or one-twelfth, being the interest claimed by the plaintiff in error.

Early in October, 1884, according to the testimony of the plaintiff in error at folio 60, he was employed by Charles A. Judkins and W. B. Devereux to make a purchase of the Webber interest, by reason whereof he attempted to affect such sale by inducing Webber to make a conveyance for $40,000. Shortly afterwards, and without the knowledge of either the plaintiff in error, Judkins or Devereux, Webber went to the City of New York, where he succeeded in making a sale of his interest to Mr. Wheeler for $55,000.

According to the testimony of Judkins (folio 63), Devereux told him at that time that the defendant might take an interest with them in the purchase of the Emma mine, and that he, Devereux, could not very well make a purchase of real estate in Pitkin County without including the defendant therein. The testimony of the plaintiff's witnesses upon the same subject will be alluded to in the course of the argument. The plaintiff, after be-

coming convinced that his claim to one-twelfth of the proceeds of the mine, regardless of the lease, would not be complied with, brought the action, first, to recover his commission for his services in making the sale of the Webber interest to Wheeler, and second, to recover the difference between the amount which he had received upon his one-twelfth interest from the proceeds of the mine and the amount which he claimed to be due.

After the Court had taken the case from the jury at the first trial as above narrated, the plaintiff filed his second amended complaint, the second cause of action being the one upon upon which chief reliance was then and now made. It is a complete departure from that which before then was stated and relied upon by the plaintiff. Instead of claiming to be entitled to one-twelfth of the proceeds of the Emma mine, because his interest was not subject to the contract of September 26, 1884, and therefore emancipated from the burden of the lease, he alleges in substance that inasmuch as under the terms of said contract, one-fourth of two-thirds of the proceeds of the mine was set apart for Webber's portion, the plaintiff, by virtue of his deed from Webber, was entitled to one-half of that amount, or one-twelfth of the whole. That since his conveyance from Webber was absolute and accompanied by no restrictions either as to the lease or otherwise, therefore he was entitled, by virtue of the contract and of his deed, to a full one-twelfth of the proceeds, regardless of the extent of the burden of the lease, and that inasmuch as he had only received one-twelfth, subject to the burden of one-twelfth of the lease, he was entitled to the sum of $4,892.96, that being the difference between the sum paid and the sum claimed. (See complaint, folios 34 to 44 inclusive.) The defendant answered the second amended complaint substantially as he had answered the first, in which answer he applied, by way

of counter-claim, for judgment against the plaintiff for $315, being the proceeds of ores received from the mine belonging to one Markell, to whom subsequent to September 26, 1884, the defendant in error had conveyed one-tenth of the Emma mine, and said demand having been assigned to the defendant for value. A trial was had at the November term, 1886, of said Court, which resulted in a verdict and judgment in favor of the defendant in error for $315, and that having been waived, on the 28th of February, 1887, judgment was entered for the defendant and against plaintiff; from which judgment this writ of error was prosecuted by the plaintiff.

The plaintiff assigns nine errors which he alleges were committed by the trial Court, but discusses very few of them, and those which are discussed relate chiefly to the instructions given and those refused by the Court, to the jury.

He expresses the position which he here contends for in the following language, on page 3 of his argument: "He now claims that by virtue of his deed from Webber and also by virtue of the understanding he had with Webber at the time the deed was executed, he is entitled to hold his interest free and clear from the burden of the lease," and then goes on to state that the only facts in dispute are as to whether at the time that Webber deeded to the plaintiff it was understood that plaintiff's interest should be free from the lease held by Nevitt for Webber, and whether at the time of making the agreement of September 26th, 1884, and the purchase of November 22d, 1884, the defendant knew that Webber owned the lease held by Nevitt, and had conveyed to plaintiff from the same.

I.

We shall have but little to say concerning the first cause of action stated in the complaint. In effect it is

claimed by the plaintiff that, having been employed by the defendant for the purpose, and having been instrumental in securing the sale to defendant by Mrs. Webber of her interest in the Emma mine, by reason of such employment, he is entitled to $5,000 as an agreed commission.

Now, it is undisputed in the testimony that the plaintiff and defendant never exchanged a word upon the subject of the purchase of the Webber interest. It is also beyond question, according to the testimony of Judkins himself, who assumed to have been the principal mover in the transaction, and who was also one of plaintiff's witnesses, that he made the contract with the plaintiff, substantially as stated in plaintiff's testimony; that Devereux, the defendant's agent, told him that he thought defendant would take an interest with them in the purchase of the Emma lode; that he saw Devereux write a despatch or letter concerning the matter; that Devereux told him he must get the plaintiff to make the purchase, plaintiff being the only one who could negotiate with Webber; that plaintiff reported to him, Judkins, his progress from day to day, who, in turn, reported to Devereux, as the negotiations continued.

According to the testimony of Webber, who was also one of plaintiff's witnesses (folios 65 to 70 of the Record), the plaintiff and Judkins were extremely urgent in inducing him to sell his wife's interest, but he did not remember that there were any negotiations with defendant. It also appears that without apprising any one of his purpose, Webber quietly left Aspen and went to New York, without the knowledge, advice or suggestion of any one to that effect, and there, independently of any previous arrangement, made a conveyance to Mr. Wheeler of his interest. Wheeler himself declares that Webber came in upon him very unexpectedly on the 11th of November,

1884, saying that Judkins had been trying to buy his sixth interest in the Emma, and as he thought that Judkins meant the defendant, he concluded to come and deal with defendant direct; that he knew nothing about Mr. Rucker's connection with the transaction, and never heard of the latter's claim prior to the demand made by Rucker previous to bringing the suit. He also says, at folio 79, that prior to January 1st, 1885, Devereux, although his agent, had no authority to either purchase or sell real estate for him; that he knew nothing of Webber's intentions to go to New York until the day before his arrival, when he received a telegram that he was on his way to see him.

Mr. Devereux substantiates all that defendant says concerning this transaction, and says that plaintiff during all this time was the attorney of Webber and Nevitt; that in the negotiations he had with Judkins about the matter, witness was acting for himself and on his own responsibility, without communicating with anybody; that he never employed the plaintiff, who received instructions from Judkins; that he and Judkins were operating for the purpose of purchasing the interest for themselves rather than for the defendant; that one-twelfth was all that was coming to him, Devereux, which he would have allowed Mr. Wheeler to have if he had secured it; that Wheeler telegraphed him not to buy Webber's interest, after which he tried to place it elsewhere, and did not inform defendant; during that time Webber left Aspen without witness's knowledge; that they then advised with one Peter Finnerty about coming in with them and sharing in the purchase, and that was after Webber departed. That he never talked with Rucker but once about the matter, who said that he was making some progress upon the bond, and that he had some hold upon Webber which

he would use if the latter did not make the bond pretty soon.

It is, then, indisputably proven, first—that the defendant never employed the plaintiff to make the purchase; second—that defendant's agent never employed him to make the purchase for the defendant; third—that defendant's agent had no such authority, even had he made such an attempt; fourth—that Judkins was the man who employed the plaintiff for himself and Devereux; fifth—that the purchase was to be made by Judkins and Devereux; sixth—that afterwards Judkins and Devereux endeavored to enlist Finnerty with them in the enterprise; seventh—that plaintiff was employed by Judkins and Devereux on account of the influence it was supposed he could exercise over Webber by reason of his past and present relations with him; eighth—that regardless of the plaintiff's attempt to obtain the property Webber proceeded to New York, independent of every one, and without the knowledge of any one, and there made some arrangement with Wheeler, by which the latter acquired the interest.

If, now, we turn to the second amended complaint, we find the allegation of plaintiff to be that during October, 1884, Julia Webber was the owner of a one-sixth interest in the Emma lode mining claim, *and the defendant desiring to purchase the same, agreed with the plaintiff* that in case he assisted defendant and his agents in procuring the same he, the defendant, would pay a certain compensation therefor.

We shall not burden the Court with any authorities upon the proposition that plaintiff's proof must correspond with his allegations, and that the setting up of one contract is not sustained by proof of some different, independent contract, and that having failed to establish the contract sued upon, even if the proof had shown that the

service of the plaintiff had resulted in something definite, there can be no recovery from this defendant. The proposition is stated so succinctly by the Court below that we shall content ourselves with the following quotation from its instruction:

"On the cause of action as stated here, in order to show any right upon the part of the plaintiff to commission for which he sues, in making the sale, the proof must be of a sale made to the defendant, or an agreement for a sale to be made to the defendant, not a sale to Judkins and Devereux, not a sale to Judkins and the defendant, because that is a very different matter from a sale to the defendant alone. If Judkins was to be interested in the purchase he would also join in the payment of the commission—that is to say, Judkins and Devereux, if they purchase, Devereux acting on his own behalf, Judkins and the defendant, if they purchase jointly, would pay it. If some other man was brought into the purchase—some one not named at that time or referred to in any way—then it would be that other man and Judkins who would pay the plaintiff the commission. Furthermore, it does not appear—in fact, the evidence tends to prove that Devereux had no authority from Wheeler at that time to make any purchase of this property or any other, and, of course, an agreement by Devereux on behalf of the defendant to purchase this property would not be binding on the defendant unless afterwords with full knowledge of the situation and circumstances, and of what had been done by Devereux in his behalf, he should ratify and confirm what had been done by Devereux. I do not see that this evidence proves, taking all that is said about it by these witnesses, a contract on behalf of the defendant to purchase this property through the plaintiff. I say now generally upon this branch of the case that it must appear to you from the evidence, that there is an

agreement between the plaintiff and defendant—Mr. Rucker and Mr. Wheeler—to the effect that Mr. Rucker was to secure the property for him and that he was to pay him for that service. The agreement which appears to be stated by Judkins and by Devereux, is not of this character—that is, that was an agreement that Judkins would purchase with somebody else, and of course Judkins would be chargeable with the commission if it was carried out."

We allude, without discussion, to the fact that the plaintiff has assigned, without discussing his alleged errors, numbered one and two, and since there has been no reference to them in the original argument, we trust there will be none in plaintiff's reply, since his silence in his original argument should be conclusive as to his opinion of their relevancy.

II.

In order to fully understand the claim constituting the socond cause of action of the plaintiff, let us, for a moment, refer to the complaint.

It appears by the second paragraph thereof that A. C. Fisk, then being in possession of the Emma mine, adversely to Webber, made a lease of his interest to C. F. Abbey. Webber secured from Abbey a transfer of an interest in this lease in the name of C. D. Nevitt, his brother-in-law, said interest being sixteen-sixtieths of the whole, and succeeded in getting such interest on November 26, 1883.

On the 28th day of April, 1884, Webber gave plaintiff a quit-claim deed to an undivided one-twelfth of the mine as compensation for legal services rendered and to be rendered, Webber having previously begun a suit in ejectment against Fisk and the administrator of Abbey to recover possession of his alleged interest. We have

the right to assume, therefore, that when Webber made his deed to plaintiff he was not in possession of the mine. He is also estopped from claiming possession, because the action in ejectment is conclusive of the ouster, expressed or implied.

Not contenting himself with what he claims in his argument to be the effect of his deed, the plaintiff, in the fifth paragraph of his second cause of action, as stated in the complaint, alleges that, *at the time of making the deed to him by Webber, it was agreed between them that the interest of plaintiff should not be subject to the burden of the lease made to Abbey and Nevitt, which was under the control of Webber*, and that plaintiff received the deed and entered upon the performance of the consideration at once.

By the sixth paragraph it is stated that on September 26, 1884, the defendant being the owner of the mine subject to the Webber lease, Nevitt being the representative of that lease (Webber claiming the lease to the latter), an agreement was entered into between Wheeler, Webber and Nevitt, which is set forth at length.

By the seventh paragraph it is alleged *that, at the time of the execution of the agreement of September 26th, this defendant knew that Nevitt was representing Webber; that the lease was owned by Webber, and that the plaintiff was entitled to one-twelfth of the proceeds of the mine under and in virtue of said agreement.* That, pursuant to said agreement, the management of the said mine was given to the defendant, who thereby became the custodian of its proceeds.

By the eighth paragraph he alleges that on October 21, 1884, defendant purchased Nevitt's leasehold interest in the mine, notwithstanding Nevitt was acting for Webber, and that after that purchase he took an assignment to himself of the same, in consequence of which he became entitled to one-third of the ore to be produced until the termination of the lease, on November 21, 1884.

By the ninth paragraph he alleges that on November 17, 1884, Henry Webber sold his interest in the Emma mine, being one-sixth, to Julia, his wife, and on the 22d day of the same month she sold that interest to the defendant, that the said sale comprised not only her interest in the said mine, but her interest in the proceeds thereof, and that at said time there was due to the plaintiff from said proceeds $4,892.96, which defendant converted to his own use.

By the eleventh paragraph he alleges that *when the defendant secured the Webber title he knew that plainttff and Webber had agreed, when plaintiff obtained his title, that his interest was not subject to the burden of the lease, and that the plaintiff wvs to receive from the interest of said Webber as his grantee, a full one-twelfth share and interest in the ore produced from the mine.*

By the twelfth paragraph thereof he claims that by virtue of the sale made by Webber to Wheeler, *and the knowledge of all concerned that when plaintiff obtained his interest in that mine it was agreed between him and Henry Webber that it should be emancipated from the burden of the lease*, the defendant is liable to pay the plaintiff the amount in dispute.

It will be seen from the above summary that plaintiff's second cause of action is based upon two theories or propositions. The first is, that having obtained the deed from Webber of a twelfth interest therein, Webber being at the same time the equitable owner of the leasehold interest therein, the said deed, by operation of law, vested in plaintiff the full title to an undivided one-twelfth of the mine, free from all burdens and incumbrances under the control of the grantor. The second is, that at the time the conveyance was made to plaintiff, he and Webber had a distinct agreement upon the subject, to the effect that the plaintiff's twelfth interest should be abso-

lute and not in any wise affected by the lease. In other words, the plaintiff claims, first, that by operation of law, and second, by an express agreement with the grantor, his one-twelfth interest in the Emma mine was intended to be full, free and absolute *ab initio*; and that no subsequent arrangement, agreement or condition made without his express assent could in anywise tramel or modify the extent of his claim or interest.

We will consider the two theories of his complaint separately, notwithstanding the fact that we think that he has failed to do so, and that he complains of some portion of the Court's instructions which were necessarily based upon his own testimony and his own allegations of an express independent agreement.

1. Counsel quotes from the Revised Statutes of the State of Colorado, Sections, 4, 5, 7, and 9, pages 171 and 172, General Laws of 1883, the object of which, we presume, is to sustain the proposition that by virtue of his conveyance there is no doubt of his right absolutely to one-twelfth of the proceeds of the Emma mine, prior as well as subsequent to the 21st day of November, 1884. We have no fault to find with the provisions of the statute referred to, but it seems to us that the plaintiff has entirely misapprehended their scope and meaning.

The object of Sec. 4 was simply to give the grantee of an absolute grant any subsequently acquired title of the grantor to the premises granted, and is but an enunciation of the common law upon the subject as applicable to deeds with general covenants of warranty. The effect of the common law rule has by the statute been extended to conveyances purporting to convey an estate in fee simple, whether accompanied by covenants of warranty or not. We cannot see, therefore, the applicability of this statute to the case at bar, unless it should be applied in a manner entirely at variance with the plaintiff's claim. In

the first place Webber has not acquired any subsequent title, and the settlement of September 26th was simply a recognition by the defendant of his claim to one-third to the extent of one-fourth. The deed of quit-claim from defendant to Webber did not in anywise invest Webber with a title which he did not have before, except in so far as it confirmed the same as against the claim of the defendant Wheeler. And inasmuch therefore as it did not give to Webber something which he had not when he made the deed to the plaintiff, it simply effected a settlement of what Mr. Rucker was employed to effect by suit and judgment. In consequence it gave to Mr. Rucker only what he would have had if the suit in ejectment which he was waging for Mr. Webber had terminated successfully after trial.

If it be assumed for the purpose of the argument that the quit-claim deed by defendant to Webber did convey some different and distinct title, then the title that was conveyed must be taken with the limitations imposed upon it by the contemporaneous agreement of September 26th. By that agreement instead of receiving one-fourth of the proceeds of the mine absolutely, Webber agreed to take one-fourth of two-thirds only, the remainder being saddled with the proportionate share of the lease-hold interest to Nevitt; and since this was distinctly recognized by all concerned, then whatever the plaintiff claims must be limited by all the conditions attendant upon the acquisition of the subsequent title.

Section 5 of the quoted statute is merely declaratory of the law as it would be had such statute never been enacted.

Section 7 was intended to obviate the technicalities of the rule in Shelley's case, and section 9, like section 5, is merely declaratory of the common law.

We must, therefore, after all return to a consideration

of the plaintiff's deed that we may the better understand the character of his claim. The conveyance is one of quit-claim, pure and simple, and it is set forth at length in the bill of exceptions (folios seventy-four and seventy-five of the transcript). It recites that in consideration of $1.00 the grantor, granted, bargained, sold, remised, released and forever quit-claimed to the grantee an undivided one-twelfth of the Emma mining claim with all the metals, etc., contained therein, and all the use, right, title, interest, etc., of the party of the first part in and to the said interest.

The deed of quit-claim is well known as one the commonest forms of conveyance in America, and is intended to transfer the grantors present title, without covenants either of a general or special warranty. It is analagous to the old deed of bargain and sale, but far simpler, and even less extensive in its operation than such conveyance. If the present title of the grantor is a fee simple it passes by such conveyance, but if it is a mere equitable right, that alone will pass, and no subsequently acquired interest or title could be claimed by the grantee under such a conveyance.

The settled law of the Supreme Court of the United States is "that one who takes simply by a quit-claim deed is not a *bona fide* purchaser without notice."

Brewer, J., in Church vs. Spiegelberg, 31 Fed. Rep., 600.
Oliver vs. Piatt, 3 How., 410.
May vs. LeClaire, 11 Wall., 232.
Villa vs. Rodriguiz, 12 Wall., 338.
Dickinson vs. Colgrove, 100 U. S., 578.

It has been held by the Supreme Court of Colorado, following the decisions of the Supreme Court of Illinois (from which our statutes are taken), that a quit-claim

deed is as effectual to pass the title to real estate as any other, and that a purchaser accepting such deed *without notice of prior rights* will be as fully protected as though his deed contained full covenants of warranty, except where it appears from the conveyance that it was not the intention of the vendor to convey the land in controversy.

Bradbury vs. Davis, 5 Colo., 269.
Following, McConnell vs. Reed, 4 Scam., 117.
Morgan vs Clayton, 61 Ill., 35.

We are more than willing to concede to the plaintiff the full effect of his conveyance as outlined by these decisions. Unfortunately for him, however, he had full notice of prior rights;—first, of the defendant under his grantors, and second, of the equitable right of Nevitt in so far as it was necessary for him to occupy the separate estate in the premises in order to give Webber possession of the property under the lease from his adversary, without incurring the consequences of the admission of that adverrary's title, which the taking of the lease direct to himself would involve.

When the plaintiff obtained his deed the situation of the claimants to the property was practically this—Fisk and the heirs of Abbey claimed title to the whole property, Webber claimed title to one-third adverse to Fisk; the title which he took was therefore at the time in litigation. Fisk had, on the 20th of November, 1883, leased his interest to his co-tenant Abbey, and Webber desiring to obtain possession, without in anywise endangering his legal rights, got his brother-in-law Nevitt to obtain an assignment to him of sixteen-sixtieths of the Fisk lease, and afterwards, as it was claimed, the whole. This leasehold interest then was absolutely distinct, and kept distinct purposely, by Webber from his own title, as a interest emanating from Fisk who was hostile to

Webber's claim. It was preserved, therefore, as a seperate independent right to the property, standing in the name of Nevitt, the latter being absolutely in possession under it and working the property by virtue of it. To the world he was absolutely its owner. About the time of the making of the deed from Webber to plaintiff he formerly instituted his action in ejectment against Fisk and others, alleging Fisk's possession, which, of course, was maintained through the possession of his sub-lessees, and declaring an ouster or possession upon the part of Webber. Nevitt found ore in July, before which time Wheeler had purchased the title hostile to Webber. He immediately began proceedings against Nevitt, who was defended by Rucker by virtue of his arrangement with Webber, and this litigation was undetermined on the 26th day of September, 1884.

The interest, therefore, which Mr. Rucker acquired under the Webber deed was such an interest as Webber had, and was determined by the condition of his title at the time.

The plaintiff, as Webber's attorney, knew full well the necessity of keeping the lease distinct from the title of his client. He knew that it was essential as an independent branch of his adversary's claim that Webber's ownership of it must be absolutely equitable, and no knowledge of the fact should for a moment be permitted. Nevitt, therefore, was the legal holder of the lease, the equitable interest belonging to Webber. He was trustee for Webber, and that trust existed by parol, in all probability. It was extremely important that the independent character of Nevitt's interest should be concealed from the defendant and all others, else the defendant instead of settling as he did on the 26th of Sept., 1884, would doubtless have set up the fact that Webber was the owner of the lease upon the property executed by the defendant's own grantors,

and that by accepting such lease, Webber had admited the title of Wheeler, thereby defeating his own. It goes without saying, therefore, it seems to us, that when Webber made his conveyance to Rucker such conveyance operated to convey to Mr. Rucker one undivided twelfth of the Emma mine, that twelfth being based entirely upon the title of Mr. Webber, and *no other*. When, therefore, the negotiations for the settlement began there were three interests to be considered. First:—The claim of Wheeler to the whole mine. Second:—The claim of Nevitt to a lease upon the mine from Wheeler's grantors, expiring on November 20th, 1884, and, Third:—The claim of Webber, together with his grantee Rucker, to one-third of the mine.

The defendant in the negotiations leading up to the settlement, was represented by his attorney, J. M. Downing; Webber and Nevitt were represented by their attorney, who is the plaintiff here. The preamble of the settlement as finally agreed upon distinctly outlines its purpose. It is made by and between Jerome B. Wheeler of the first part, C. D. Nevitt of the second part and Henry Webber who is the third party to it. It reads: "Whereas, the first party is the owner of certain interests in the Emma mine, and a suit is now pending in the District. Court on behalf of Webber against him and others for a one-third interest therein, and whereas another suit is pending in behalf of Wheeler and others against the party of the second part to recover the possession of the mine. and whereas the party of the second part claims to hold a lease of said mine expiring on the 20th day of November, 1884, and whereas the parties being desirous of compromising and settling the said actions, it is agreed in consideration of the premises," etc.

It certainly was not supposed by Mr. Webber that the plaintiff had any right to claim that his interest in the

mine was not subject to the burden of the lease either prior to or at the time of the settlement, because he says in his testimony (folio 71 of the transcript) that his understanding both before and after the settlement was that the plaintiff's interest was subject to the lease. He says also that he sold to Mr. Rucker, who acted as his attorney in the making of that contract.

This statement of Webber's is referred to here because we think it bears directly upon the claim of the plaintiff that by operation of law his deed gives him an absolute title to the interest therein mentioned, regardless of the position of his grantor.

The giving to the plaintiff an undivided one-twelfth of the proceeds of the Emma mine would be massing upon the remainder of Webber's interest a disproportionate amount of the burden of the lease, and declaring such a result as founded upon the making of the deed of April, 1884, would give the plaintiff, as the attorney for Webber, a far greater benefit by the terms of the settlement than were derived by his client. We think Webber would have been justified in insisting that the plaintiff's twelfth should have been reduced by the settlement *pro tanto* with his own.

It seems to us if the plaintiff intended to make this claim, he shonld have notified Mr. Webber of it before the execution of the agreement of September 26th, since otherwise Mr. Webber would doubtless have insisted upon a different settlement, and perhaps have obtained better terms. He would doubtless have insisted that if the effect of his deed to plaintiff was to give to plaintiff his one-twelfth absolutely, notwithstanding the terms of the settlement, then the one-third interest of the lease should have been deducted from the entire proceeds of the mine upon a different basis, and one more favorable to himself than the one adopted. That such was not his understand-

ing nor the understanding of the defendant, nor of any one else interested is manifest by the undisputed testimony of Mr. Devereux, who says that in addition to paying Mr. Rucker his proportion of the proceeds of the Emma mine less his proportionate amount of the leasehold interest, he also paid Mr. Rucker his proportion of royalty or rent derived from the lease. It is true that plaintiff asserts, and his assertion is not denied, that he received his proportion of this royalty in ignorance of the fact it was paid to him as such, and that consequently he is not to be prejudiced by the fact of having received it. Assuming that as true, the payment of it in the manner specified is material as showing what the general understanding of the parties to the contract was. Thus, Mr. Devereux says, at folio 82, that in settlement with plaintiff the latter received his proportion, or one-twelfth of the royalties accruing to the owners under the lease. He also says that whenever any profits were paid, one-third was first deducted from the amount of the profits and the balance was then divided, one-twelfth of which balance, being one-twelfth of two-thirds of the whole, being credited to plaintiff. Of the one-third set aside under the Nevitt lease, fifteen per cent was deducted for royalty, and that was divided in the same manner, one-twelfth going to suspense account. *He also says that plaintiff never claimed that he was entitled to one-twelfth of the full proceeds of the mine upon any other ground than that he was not a party to the contract of September* 26, 1884.

This statement is material in the view that the suit first brought by the plaintiff was based upon the theory that not having signed the agreement of September 26, 1884, he was not bound by its terms, and consequently was entitled to his one-twelfth independent of the contract. Whereas, as has been before stated, his claim now is

under the contract and the effect to be given under it to his deed.

In this connection it may be proper to state that although Mr. Rucker, upon the occasion of the receipt of his first payment, was paid more than the amount of money coming to him, yet it distinctly appears at follo 83 that the payment was so made for his accommodation, and not in recognition of his claim in any respect.

We have no desire to unnecessarily criticise the position assumed by the plaintiff in the case, or to comment invidiously upon his claim when considered in view of his relations to Webber. Duty requires us to state, nevertheless, that the relation of attorney and client, which existed between the plaintiff and Webber before, at the time of, and subsequent to the agreement of September 26th, makes it improper that he should claim a benefit and advantage from the settlement of September 26th, distinct from and in every respect greater than that which he secured for his client. He should be content that no part of his twelfth interest was sacrificed to the compromise. The object of that settlement was to do away with any controversy between the parties. Each desired to obtain the best possible terms. Plaintiff obtained his interest in the Emma mine as a consideration for looking after the interests of and obtaining the best possible terms for Mr. Webber and Mr. Nevitt. Having secured terms, having obtained recognition of Nevitt's lease to the extent of one-third, having imposed its weight impartially upon defendant's three-fourths and Webber's one-fourth, which included plaintiff's own one-twelfth in the mine, can he now be permitted to say: "It is true they made this settlement. It is true that I advised my clients to accept it. It is true that the burden of the lease was distributed equally upon the entire title to the mine, but, inasmuch as I hold a quit-claim deed from one of the parties to that

contract as a consideration for my legal services, therefore that interest shall not only pass to me unimpaired, but it shall also be relieved from the weight of the lease, and be unencumbered by any of the conditions of the contract which I made for them, and which I advised them to accept?"

We claim that such a position is irreconcilable with the duties and responsibilities resting upon the plaintiff's shoulders at the time of the settlement, and which required that he should obtain no advantage or benefit to himself which his client could not share at least to an equal extent with himself.

Heffron vs. Jayne, 33 Ind., 463.
McCormick vs. Malin, 5 Blackf., 509.
Kisling vs. Shaw, 33 Cal., 425.
Ford vs. Harrington, 16 N. Y., 288.

It will be noticed, upon a close examination of the agreement of September 26th, that Mr. Wheeler is treated throughout it as the owner of three-fourths interest in the mine, while Webber is treated as the owner of the remaining one-fourth, which, of course, comprises the entire title. That one-fourth, therefore, includes Mr. Rucker's one twelfth, and necessarily includes it in the settlement. If, now, we turn to the agreement, we discover that the lease continues on one-third of the claim; it, therefore, rested upon one-third of Mr. Wheeler's three-fourths and one-third of Mr. Webber's one-fourth. The profits are to be divided: First, by taking two-thirds thereof and dividing it into disproportionate parts —three-fourths of the two-thirds to go to Wheeler and one-fourtn to Webber. The rent, or royalty, to be derived from the lease is to be similarly divided and distributed.

We challenge the plaintiff to show where anything in-

serted in the contract draws any distinction between his one-twelfth and the one-fourth so held by Webber, and the remainder thereof. How easy it would have been if at the time it was the plaintiff's intention to claim his interest, with the onus of the lease stripped therefrom, to have so worded and framed the contract that such intention should appear. Not having so done, he cannot at the present time insist upon such an enormous advantage. Does it not seem that the plaintiff concealed his intention of making this claim until all the parties to the agreement had executed it, after which, feeling the ground firm beneath his feet, the time had arrived to spring his claim upon all concerned and insist upon what he calls his legal rights, as based upon his deed of April 1884?

According to the testimony of Mr. Devereux, he said, on one occasion, when talking about the purchase, that "he had a clinch on Webber which the latter did not dream of, and which he would use if he did not get a bond pretty soon. That Webber thought he would get a sixth of the proceeds of the mine free from the lease, but that plaintiff had bought a twelfth of the mine; that he didn't sign the compromise agreement, and he was going to have a twelfth of the mine and Webber had got to see that he received it." Plaintiff denies having made such statement, but the jury, in rendering their verdict, practically confirmed the evidence of Mr. Devereux, and it would seem from the statement that plaintiff concealed his intention to make such claim until the compromise had swept all litigation out of his pathway and the time had come for a division of the proceeds of the property among its different owners upon such a basis as he might dictate to his clients and to the defendant.

Plaintiff followed up his statement by giving the Aspen company notice of his ownership of one-twelfth in-

terest in the property, and was entitled to one-twelfth of the proceeds, and his contention from that time has been practically as stated in the second cause of action in his complaint, though based upon distinct and irreconcilable theories.

If his construction of the contract of September 26th be correct, it means that under the compromise Wheeler surrendered one-fourth of his claim, and got three-fourths subject to three-fourths of the burden of the lease. Webber surrendered his claim to one-third and got one-fourth of the mine, subject to one-fourth of the burden of the lease. Nevitt surrendered his claim to a lease of the whole and obtained a complete recognition of the lease to the extent of one-third of the property, and plaintiff, being attorney of Webber and Nevitt, but not having signed the contract, surrendered nothing, and got everything he could possibly have realized had Webber been never so successful.

Now, when these things are given due consideration, it seems to us that in the instructions given by the Court, and which forms the sixth assignment of error, the law was correctly stated. The court says: "In this agreement the interests of the several parties in the proceeds of the lease is expressed, that is, the amount which Wheeler should have, the amount which Webber should have, and the amount which Nevitt should have. In this instance, at least, and for some reason which is not explained, if it be true that Nevitt's position in the transaction was that of Webber, that he was only an agent for Webber in it, the parties did not carry out that suggestion, *because Nevitt's interest is stated distinctly from Webber's in the agreement with respect to the lease.*"

Again: "The position of the plaintiff is that he must be regarded as the assignee or grantee of Webber, in virtue of his deed of the preceding April for half of that amount which was reserved to Webber. He has brought

this suit to recover that. Now, as I said before, in the deed there is nothing about that, and the question is: What was the intention of the parties at the time this deed was made?':

The Court then tells the jury that this is a question of fact for their determination.

It is certain that had the lease been admitted to be the property of Webber its existence would not have been recognized, nor would it have been contended for to any extent. A deed by virtue of our statutes is always taken subject to the equities and rights of third persons in possession. This is declaratory of the common law. Rucker took his deed, therefore, subject to the fact of possession, and subject to the possibility of the recognition of the lease, unless he has been able to establish by the testimony the existence of a distinct and expressed agreement between himself and Webber as to such lease when the deed was made, or afterward and before the settlement, and that the defendant had notice of such agreement prior to his purchase of the sixth interest remaining in Webber.

Second—The plaintiff undoubtedly recognized the frail tenure of his claim that, under the deed, he was entitled, by operation of law, absolutely to an undivided one-twelfth of the proceeds of the mine, and hence he alleged, and repeated the allegation more than once in his complaint, that, *when he took his convegance from Webber, the latter expressly agreed with him that the interest described in the deed should not be subject to the burden of the lease then in existence, and standing in the name of Nevitt.*

This being a private agreement, the necessity of proving it, and of proving in addition thereto, the knowledge of its existence by the defendant is apparent; hence, such knowledge was alleged in addition.

In his own testimony the plaintiff states emphatically,

at Folio 61, that he informed Webber, when the latter gave him the deed, that under it he would be entitled to one-twelfth of the proceeds of the mine in the event of the successful ending of the said suit, or a compromise by Webber. That Webber assented to such understanding and agreement, and agreed that plaintiff should have a one-twelfth interest, independent of said lease, out of his interest in the mine. *It does not appear, even from his testimony, that defendant knew anything about such an arrangement.* The only approach to it is the plaintiff's statement that, on the night of the day the agreement of September 26th was concluded, Webber and the plaintiff had a settlement, wherein was included one-twelfth of the proceeds of the ore which had been sold by him, and he received an order from Webber, signed by Nevitt, upon the defendant for the said sum, to come out of the funds in the hands of a smelter, of which defendant was part owner, and that in presenting the order he informed defendant that it was for his one-twelfth interest in the proceeds of the ore mined, and that defendant paid such order.

We submit that the most careful examination of the transcript will not disclose any other testimony sustaining such agreement, or showing that the defendant ever dreamed of its existence. The only other man who would probably originally have known of it was Webber, and he was introduced as a witness by plaintiff, but not a word upon the subject was asked him on direct examination, save as to the conversation which Devereux had had with the witness about the matter, and a similar conversation which he had had with Judkins, which was of a somewhat heated character. On cross-examination, as before stated, the following occurred: (Folio 70.)

Q. Who first told you, if you remember, that the inter-

est of plaintiff in the Emma mine was not subject to any royalty under the lease? A. Judkins.

Q. When did Mr. Rucker first tell you that it was not subject to the lease? A. I don't remember that he ever told me so.

Q. Did he make any claim to that effect to you at that time, or at the time of the settlement of September 26, 1884? *A. I think not.*

Q. As a matter of fact did you not up to the time of this conversation suppose plaintiff's interest was subject to the payment of royalty under the lease? A. *My understanding both before and after that time was that plaintiff's interest was subject to the lease.*

He then testifies that Mr. Rucker was his attorney during all the proceedings which led up to the settlement of September 26, when the following questions are asked and answered:

Q. At the time, then, that you had this conversation with Devereux you had already learned that the plaintiff claimed that his interest was not subject to the claim of royalty? A. Yes, sir.

Q. Was that an inducement to give the plaintiff the option which you did give for ten days? A. I don't think it was.

Q. You say you had a heated argument in Wachtel's business house as to whether or not the plaintiff's interest was subject to the payment of royalty? A. Yes, sir.

Q. What position did you take in that argument? A. I took the position that it was.

He then says that Mr. Rucker was his attorney in a suit against Nevitt which it was necessary for him to bring in order to force the latter to recognize his ownership of the lease, and which lease, as it appears at folio 74, was transferred to Judkins by Nevitt for $24,000 on October 22d, and which Judkins transferred to Devereux without defendant's consent, but subsequently ratified by

him. In this transfer Webber took no part and it seems was not consulted.

It is significant that plaintiff's first assignment of error is based upon the court's permitting Mr. Webber as a witness to be asked, upon cross-examination, what his understanding was as to whether plaintiff's interest was subject to the payment of royalty under the lease. The only objection made to the testimony as appears in the record, is that of the plaintiff to counsel asking as to what his understanding of that contract was.

If, now, we turn to the testimony of the defendant, we find at folio 70 he says that he never heard of the plaintiff's claim to any money due to him by reason of the fact that he did not receive the full proportion due him under the contract of September 26, 1884, until after the first trial of the case, when he was informed that plaintiff had shifted his position and claimed under the contract instead of outside of it. Up to that time he always understood plaintiff claimed one-twelfth interest outside of the contract, on the ground that he was not a party to it.

At folio 78 it appears that during none of the time preceding the final execution of the settlement of September 26th did the plaintiff say anything about the manner in which his interest in the mine should be affected by such compromise. That he did not dissent from said compromise, and said nothing about his interest being emancipated from the burden of the lease. That he never was told by the plaintiff that the interest should be exempted and therefore it must be assumed that he was never notified of the existence of any such contract.

The witness Devereux, the agent of the defendant, first heard of plaintiff's claim after the agreement of September 26th, and then he heard of it as a claim independent of the contract of that date rather than under it.

The witness Downing, at folio 84, he being Mr. Wheeler's

attorney at the time, states that the fact of plaintiff's interest being subject to the lease was never questioned at the time that the agreement was made.

Is it strange, then, the defendant having alleged an agreement of this kind, having sworn to it himself, and thereby necessitated the introduction of testimony, that the Court should instruct the jury concerning such agreement? In fact, the "absurd proposition" which the plaintiff claims was given to the jury by the Court, is substantially the second request framed by the plaintiff, and presented by him to the consideration of the Court, the refusal to give which forms one of his assignments of error. In that request, given in full at page 6 of plaintiff's argument, occurs the following: "*If they also believe, from the evidence, that at the time of the execution of the deed from Webber to plaintiff, it was mutually agreed between Webber and the plaintiff that this one-twelfth should be exempt from the operation of said lease, then plaintiff is entitled to one-twelfth the proceeds of the mine*, and upon these facts they should find for the plaintiff to the amount fixed by the stipulation of the parties read to the jury, and interest at the rate of ten per cent. per year from August 24th, 1885, the date the suit was brought." What the Court actually said to the jury is this: "Upon that point the question is whether there was any agreement between the parties that the plaintiff's right and interest under this deed should become effectual at once upon the execution of the deed, and that he should be entitled to whatever should come under the lease to Webber, that is, to his part of one-twelfth, or five-sixtieths of the whole amount. If Nevitt was taking the whole proceeds of the mine—I believe he was—at least, it seems he did so, or assumed the right to do so, after the mine became fruitful, and that was only in August, I think, of the same year,—there were no proceeds of the mine, nothing that could be divided among them—among

the several parties—until that time, and nothing was, in fact, divided until this agreement of the 26th of September was made; so that the question must be, whether there was an agreement between plaintiff and defendant or between plaintiff and Webber, that he should be entitled to these proceeds from the time of the conveyance to him. That is a question of fact for your consideration. If you find there was such an agreement, that the parties understood and intended that Rucker should be entitled to whatever should arise under the lease according to the proportion and interest conveyed to him by this deed, from and after the deed until the end of the lease, then my understanding is that he is entitled to recover the sum specified in the stipulation between the parties. In the absence of such an agreement, then he is not entitled to recover."

So that upon the second branch of the plaintiff's cause of action, while his allegation presents a more substantial claim than the other, the proof, we find, not only fails to show it, but is absolutely against the making of any such agreement. Even had it been made after the defendant purchased the Webber interest, without any notification to him prior to such purchase, he could not be compelled to recognize the claim of the plaintiff, whose demand would be rather against his grantor than against the defendant, taking the remainder of that grantor's interest without notice.

It is scarcely necessary to cite authorities upon the proposition that the grantee of real estate takes title, subject only to incumbrances or equities as appear of record, to such claims as may exist upon the part of persons who may be in possession at the time, and to such equities of which he at or before his purchase had actual notice.

Stove Co vs. Way, 141 Mass., 557.
Whitfield vs. Riddle, 78 Ala., 99.

Jones vs. Hudson, 23 S. C., 494.
Edgell vs. Hagens, 53 Iowa, 223.
Wood vs. Box, 3 S. W. Reporter, 93.
Rubelman vs. Rummell, 33 N. W., 354.
Fargason vs. Edrington, 4 S. W., 763.

It is strange that if, as plaintiff claims, his conveyance not being limited by express agreement to the contrary, gave him the right to possession of his interest, he acquiesced in the arrangement made by the agreement of September 26th, which placed the defendant in absolute undisputed possession of the entire mine and gave him control of its workings.

The plaintiff might claim with equal force that since the agreement of September 26th could not affect his rights as against Webber, therefore the provision of the agreement giving the defendant the right to take full possession was inoperative as to the plaintiff, who was entitled, notwithstanding the settlement, to the full and immediate possession of his particular twelfth. He never advanced such a claim and it probably never occurred to him.

Why should he yield to Webber the right to determine by his settlement who should take possession, and why did he not assume and claim that Webber had no such right of settlement so far as it could affect the integrity of his absolute undivided one-twelfth?

The plaintiff complains that the interest taken by him should not be affected by a parol agreement, and that the correct principle is stated in Drake vs. Root, 2 Colo., 685, that evidence of a parol agreement can not be introduced to change the terms and effect of a deed.

We do not understand that any agreement, beyond the one alleged by the plaintiff, is sought to be introduced

either for the purpose of changing, explaining or affecting his deed.

If it be improper to consider the agreement, as to the division of the proceeds of the mine with reference to the lease, then the plaintiff never should have plead such an agreement; having done so, and having wholly failed to prove it, it is not for him to complain that the attempt has been made to violate the language of a writen conveyance, by the introduction of testimony going to show an extemporaneous agreement.

The plaintiff says that as Webber was the owner of the lease held by Nevitt, then certainly a proportionate interest thereof was conveyed to him by his deed to the plaintiff. That being the case, why the necessity of settling by an express, independent agreement that the plaintiff's interest should not be affected by it? That being the case, too, why did it not occur to the plaintiff to claim one-twelfth of one-third of the lease, as recognized by the agreement of September 26th, and to sue Webber or Nevitt, or both, for one-twelfth of the $24,000 which they received from the defendants therefor? He also says that Webber, by the agreement of September 26th, relinquished his title to the property to the extent of one-twelfth and Nevitt relinquished his claim to the lease to the extent of two-thirds. Shall this sacrifice fall alone upon Webber so that his attorney can secure not only his interest in the mine free from all conflicting interests unhurt and undiminished, but also freed from his grantors lease? We think not.

The plaintiff refers to the fact that his deed grants bargains and sells to him not only the right to possession, but to all metals, ores, gold and silver bearing quartz and earth. A quit-claim deed to mining property generally contains this language, but it can be of no more force than a deed of the property without any mention of them

A deed to Blackacre, with its appurtenances, is a deed to Blackacre; nothing more, nothing less.

It is not "a theory of the Court below" that there should be a parol agreement for the immediate possession of the interest and the ores belonging thereto, but it was the theory of the plaintiff that if he could allege and prove an actual agreement, concerning the disposition of the ores, he would be entitled to a verdict. He failed to prove it.

In fact we can safely say that in his second cause of action the plaintiff proceeds upon the single theory that when he got his interest in the property it was accompanied by an agreement excepting it from the lease, and that in pursuance of such agreement he is entitled to the money sued for.

If it were necessary to consider the complaint upon the basis that the plaintiff is entitled to the sum sued for upon any particular contract, that parol agreement and not the deed would be the one to suggest itself to any impartial mind. So essential did it seem to the plaintiff to make this agreement the preeminent feature of his complaint, that he actually alleges, in the seventh paragraph, that at the time of the execution of the agreement of September 26th the defendant knew that Nevitt was representing Webber, and that the lease, in fact, was owned by Webber, and that the plaintiff was entitled to five-sixtieths of the proceeds of the mine out of the ten-sixtieths thereof assigned to Webber. There is not the slightest shadow of testimony going to show that the defendant ever knew, prior to the time of the judgment which Webber obtained against Nevitt, that Nevitt was not the one interested in said lease, or that plaintiff was entitled to anything beyond such a sum as would be awarded to one-twelfth interest in the mine under all cir-

cumstances, but the fact that he afterwards purchased the lease from Nevitt would negative any such conclusion.

Let us suppose that, under the contract of September 26th, instead of paying any money to the plaintiff, the defendant had literally carried out the terms of the contract and had paid to Mr. Webber one-fourth of the two-thirds of all the profits of the mine, together with one-fourth of the royalty paid by the lease from the other third. He certainly would have performed his contract to the letter, and the plaintiff would have had no cause of action against him.

Let us carry the supposition one step farther and put the plaintiff in the attitude of demanding of Mr. Webber his proportion of the sum so received from the defendant. How would that proportion be ascertained? Would it not be in strict accordance with the terms of the contract? That is to say, would not Webber satisfy the claim of the plaintiff by paying him, first, one-third of the one-fourth of the two-thirds received from Wheeler, together with one-third of the one-fourth of the royalty received from the lease, being the exact amount paid by Wheeler to the plaintiff as represented and as proved? It seems to us that there can be no question about it.

It is certain that the leasehold interest, after the settlement of September 26th, was taken in the name of Nevitt and subject to his control. When it only had a month to run the defendant purchased it from Nevitt, paying him $24,000 therefor.

If the plaintiff's construction of the agreement of September 26th was the correct one, then the recognition of the lease held by Nevitt enabled Nevitt and Webber to secure more for it than it was worth, since a greater portion of it remained as a burden upon Wheeler's interest, than he was led to suppose was the fact from the construction which both he and Webber gave that agreement.

We presumed, from the position taken by the counsel on the trial of the case below, that the merger of the lease in the estate of Webber, or at least the merger after the purchase by Wheeler, would be insisted upon, but since nothing is said in the original argument upon the proposition, we shall not burden the record with our authorities upon it, and only refer to it at present lest some mention be made of it in the reply, and at a time when the defendant could not be heard concerning it.

As to the third assignment of error, that the Court refused to charge the jury as prayed by the plaintiff in the first, second. third, fourth, fifth and sixth instructions asked for by him, we have only to say that the assignment is made in violation of rule twenty-one of this Court, which requires that when an error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

For the foregoing reasons and from the foregoing testimony we claim that the judgement of the court below should be affirmed as to both counts of plaintiff's cause of action. The jury have passed upon all the facts under proper instructions given by the Court. The agreement about which the plaintiff complains such serious error was committed is the one which he originally sought to prove by his testimony, but without success.

We claim that under his deed and under the agreement' coupled with the fact that having acted as attorney for his grantor under the settlement of September 26th, he cannot claim to have made a better bargain for himself than he secured for his clients and that his interest is subject to its proportionate share of the lease to the extent of its recognition; that he has received everything which is

his due beyond the amount contended for as being subject to the lease, and consequently he has no standing in this court.

Respectfully submitted,

T. M. PATTERSON,
C. S. THOMAS,
Attorneys for defendant in error.

APPENDIX.

This Agreement, made and entered into on this 26th day of September, A. D. 1884, by and between J. B. Wheeler, of the first part, and C. E. Nevitt of the second part, and Henry Webber.

WITNESSETH, That whereas, the said party of the first part is the owner of certain interests in the Emma mine, situate in Pitkin County, State of Colorado, and a suit is now pending in the District Court of said county on behalf of said Webber against said party of the first part and others for a one-third ($\frac{1}{3}$) interest in said mine, and whereas another suit is pending in said Court in behalf of the said J. B. Wheeler and others against the said second party to recover possession of said mine: and the said second party in his defense thereto claims to hold a lease of said mine expiring on the 20th day of November, 1884, in which said suit the District Judge of said Court has made an order allowing the possession of said property to remain in the hands of said second party during the period of said lease; two-thirds ($\frac{2}{3}$) of the proceeds theoeof to be paid to John Hulbert, Receiver, to be held by him to await the determination of said suit or the further order of the Court, less a royalty of fifteen (15) per cent., and whereas said party of the second part has been for some time in the possession of said mine and has extracted a large quantity of ore, a greater portion of which is now on hand undisposed of; and whereas said second party being desirous of compromising and settling said actions it is agreed; in consideration of the premises; the said first party will, upon the ensealing of these presents make, execute and deliver a sufficient deed of quit-claim

to said Webber his grantees or assigns, for an undivided one-fourth (¼) interest in said mine and said Webber on receipt of said deed agrees to release, waive and does hereby release and waive unto said party of the first part, all claims which he may have to any further or other interest in said property.

And the suit aforesaid between the said parties to be dismissed upon each party paying their own costs therein. That the suit aforesaid between said first party and said second party shall likewise be dismissed upon the same terms, and the said second party hereby releases and waives to said first party all right and title as to said lease, save and except a one-third (⅓) interest therein, and at the end of said term to release and surrender the whole thereof and possession thereunder peaceably to said owners, their grantees or assigns.

It is further agreed that the proceeds of the ore now on hand, after payment of the cost of production and after the payment of the costs of hauling and treatment shall be divided as follows: The said party of the second part to receive one-third (⅓) thereof, less a royalty of fifteen per cent. on said one-third interest according to the terms set forth in his said lease, and the said party of the first part to receive three-fourths (¾) of the remaining two-thirds (⅔) and the said Webber, his grantees or assigns, one-fourth (¼) of the said remaining two-thirds (⅔), and during the remainder of the term of said lease, namely, up to and inclusive of the 20th day of November, A. D. 1884, the proceeds of the mine to be divided in the same manner and in the same proportions aforesaid; such division also to apply to and include the said royalty to be paid by the second party as aforesaid.

And it is mutually agreed by and between the parties hereto that during the remainder of the term of said lease the said mine shall be under the superintendence of

Joseph Ruse, who shall operate, work and develop the said property for the mutual interest of all the parties hereto and with a view to developing and preserving the said property as a workable mine as well as the production of ore therefrom, said work to be done by said Joseph Ruse in as economical a manner as possible, and to limit the production therefrom so as to correspond to the expense incident to mining, and the price for which said ore can be sold, and any failure upon the part of said Joseph Ruse to comply with the conditions herein mentioned shall be the cause for removal from such position of superintendent.

The said Joseph Ruse during his continuance as superintendent, shall be under the advisory control of said first party. And the said second party and the said Webber shall have the right at all times to make suggestions in the matter of the authority of the said party of the first part respecting the managemement of the said mine.

In witness whereof we hereto set our hands and seals on the day and year first herein above written.

J. B. WHEELER. [SEAL]
C. E. NEVITT, [SEAL]
HENRY WEBBER. [SEAL]

27-83

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In the Supreme Court

of the United States.

ATTERSON W. RUCKER,
Plaintiff in Error,
vs.
JEROME B. WHEELER,
Defendant in Error.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

A. W. RUCKER,
In Pro. Per.

WHIPPLE & PIERSON, PRINTERS, 1320-26 17TH ST., DENVER, COLO.

In the Supreme Court

of the United States.

ATTERSON W. RUCKER,
Plaintiff in Error,
vs.
JEROME B. WHEELER,
Defendant in Error.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

The brief for defendant in error so signally fails to answer the legal positions taken in our opening brief that we believe a few suggestions in reply will meet all the demands of the occasion.

It is claimed that there is an inconsistency in attempting to predicate this action on both a deed and a verbal agreement, but this is not true to the extent claimed. It is not sought to show a verbal agreement *inconsistent* with the deed, but one in entire harmony therewith. We were driven, to some extent, to adopt this course of pleading, in view of the known position of the Court, as announced in its charge to the jury, that the deed *constitutes no contract* as to whether the interest of plaintiff in error was or was not subject to the lease held by

Nevett for Webber, and finally recognized by defendant in error in the settlement of September 26, 1884. But, whatever may be urged upon this point, it cannot be said that any rights, under the deed, have been either *forfeited or waived.* That there was an agreement that the interest in question should be held free from the lease is strongly corroborated by, and definitely expressed in, the deed. While it is true that a deed to land conveys all minerals contained therein, still the express mention of such minerals shows an intent inconsistent with a lease under which they can be severed and taken from the real estate conveyed. It is true that Webber, in his testimony, states that it was his understanding that he conveyed to plaintiff in error subject to the lease. He does not claim that anything was said on the subject. If anything was said he should have stated the *conversation* and not his *understanding.* The form of this testimony was made the subject of an exception and the first assignment of error. But, in an affidavit used upon the hearing of the motion for a new trial, Webber states that he understood, at the time of the execution of his deed to plaintiff in error, that he was conveying the interest free from the lease. It was a matter of doubt upon the trial as to what Webber had actually stated upon this point, which doubt, however, was removed by his subsequent affidavit. The motion for a new trial should have been sustained upon this ground alone.

It is contended by defendant in error that the plaintiff in error is, in some manner and upon some principle not clearly stated, estopped from asserting that he took his interest free from this lease. It is said that he participated, as the attorney of Webber, in making the contract of September 26, 1884, and that he should then have asserted his rights. But it is too plain for argument that he was not called upon to make any such assertion. His rights

were not then in dispute, nor were they the subject of discussion or settlement. He understood from his deed, and from his agreement with Webber, that his interest was free from the lease. In this settlement he secured the recognition of Webber's title to a one-fourth interest in the property, and a lease upon four-sixtieths *more than had ever been claimed before.* He understood, and the fact stands admitted, that Webber owned this lease. The lease rested only proportionately upon the one-fourth interest of Webber. There is no ground, therefore, for any suggestion that the plaintiff in error, by claiming an interest free from this lease, was doing any injustice to his client. As a matter of fact Webber has never claimed this fund which is due the interest of plaintiff in error. It is certain that either Webber or the plaintiff in error is entitled thereto. The defendant in error has converted it to his own use *without any shadow of title.* He makes no claim that this fund was ever conveyed by Henry Webber to Julia Webber. (Record 6, 9). He did purchase from Julia Webber the ores due the Webber interest which had been extracted during the five days that the title was in her, but the fund in question accumulated prior to the execution of the deed from Henry Webber to his wife. The defendant in error, therefore, is in the position of asserting that he will keep this money, not because it belongs to him, but because it belongs to Webber; and he does this notwithstanding Webber *makes no claim thereto*, but, on the contrary, has, by his affidavit heretofore referred to, *absolutely disclaimed* any and all claim to the same. It is seriously urged that because it was recognized by this contract of settlement that Webber was entitled to a one-fourth interest which included the interest of plaintiff in error, therefore this latter interest must be taken with a proper proportion of any and all burdens incident to the whole, and that any other claim must have been made at

the time and been recognized by the contract. Upon the same principle, and with the same reason, it could be urged that the plaintiff in error was estopped from claiming any interest under his deed. The suggestion that plaintiff in error "concealed his intention of making this claim until all the parties to the agreement had executed it" should never have been made by an attorney claiming respectability. According to the weight of testimony in the cause he not only did not conceal this intention, but he expressed it at the time he received his deed; and he had inserted in the deed provisions which were wholly *inconsistent* with any other intention. If any one expected the plaintiff in error, at the time of this settlement, to take less than his deed called for, the duty rested upon him to speak. There is nothing to show that any intimation was made at that time by any one inconsistent with his present contention. On the contrary the first act of Webber was to proceed to give an order to plaintiff in error for his interest in the proceeds of the property, precisely in harmony with the present claim of the plaintiff in error.

The position taken by counsel for defendant in error to the effect that Webber, by reason of having instituted an action in ejectment for his interest in the property, is estopped from asserting ownership of, or possession under, the lease held in the name of Nevett, is not maintainable. Our statute (Civil Code 1883, Sec. 268) provides that "if the premises for which the action is brought are continually occupied, such actual occupant shall be made defendant in the action, together with any person claiming title to or interest in the premises adversely to the plaintiff. If the premises are not occupied the action shall be brought against any person exercising acts of ownership on or over the premises claimed, or who claims title thereto or some interest therein at the time of the com-

mencement of the action," and further (*Id.* Sec. 278) that "if the defendant files or makes any other answer or defense than a disclaimer of title or right of possession it shall not be necessary for the plaintiff to prove him in possession of the premises at the time of the commencement of the action or at any time." But Webber never claimed to be in possession, under the Nevett lease, of more than sixteen-sixtieths of the property. There is some suggestion in the charge of the Court to the effect that Webber claimed the possession of the entire property under this lease, but it finds no foundation either in the pleadings or evidence in the cause. Possession, therefore, under this lease, was entirely consistent with an actual ouster, as to the interest which Webber had originally owned in the mine. Webber was, then, in possession under this lease, at the time he conveyed to plaintiff in error, and, by his deed, conveyed an interest in the lease, as well as the title which Webber then owned, and which was subsequently recognized by the deed of defendant in error. It matters not whether the plaintiff in error took the legal title free from the lease, or took the legal title subject to the lease, *together with an interest in the lease*, for, in one case, he would have nothing to do with the lease, while in the other he would take the title burdened with the lease, but, as he owned a proportionate interest in the lease, and as a proportionate interest in the royalty would be due his legal title, his interest, in either event, would be the same. He certainly did take, *immediately* upon the execution of the deed to himself, in one or the other of these forms. He did this not only by force of the statute (former brief, page 6), but by the very terms of the deed, by which *immediate possession* was expressly conveyed.

It is claimed by defendant in error that if it be assumed that the deed from defendant to Webber be con-

sidered as having conveyed to, and vested in, Webber, a title *distinct from his former title,* then the interest of plaintiff in error would necessarily be impressed with the same burdens as the remaining interest of Webber would. While no such assumption is to be made, still, if it were, the conclusion would not follow. Webber had undertaken to convey, *in presenti,* a definite interest, and, unless he made some subsequent agreement releasing himself from his obligation, he had to make this interest good out of any title he then had, or subsequently acquired—particularly if acquired upon *pre-existing equities.* The terms upon which he settled had absolutely no bearing upon the prior obligation which he had incurred by his deed.

For some purpose which is not very apparent, the alleged rule is invoked that a person holding by a mere quit-claim deed is not a *bona fide* purchaser without notice as against prior equities. While there is a great contrariety of opinion upon this question, the principle is thoroughly settled in this State against this contention. (Bradbury vs. Davis 5 Colo. 285). This conclusion has been reached by a construction of the legislation of this State, and that construction must, upon well settled principles, be accepted by the Supreme Court of the United States in all causes arising in this State. But there is no one asserting any equity prior to, or inconsistent with, the deed to plaintiff in error. This deed was recorded and the defendant in error acquired all his rights subsequent thereto and with full notice thereof. Fisk, through whom, by mesne conveyances, the defendant in error claims title, had full notice of all the rights of both Webber and the plaintiff in error. The deed therefore operated to convey all the interest which Webber had at the time, or which was confirmed in him by the subsequent settlement, to the undivided interest in the property mentioned therein.

This proposition was sufficiently established by the authorities cited in our opening brief. (page 22).

It is claimed by defendant in error that the deed in question is nothing more than a quit-claim deed. Neither the mere presence of the word "quit-claim" nor the absence of a covenant of warranty is decisive of the question as to whether a deed is a mere quit-claim deed or not. (Taylor vs. Harrison 47 Texas 454; 26 Amer. Rep. 304). In Sibley vs. Bullis (40 Iowa 439) the Court said: "The conveyances are not *mere* quit-claim deeds; but contain the language, 'do hereby sell and convey unto,' as well as quit-claim." This decision was approved in Wilson vs. Irish (62 Iowa 260). In Cutler vs. James (64 Wis. 173) the Court held that under statutory provisions similar to ours a mere quit-claim deed is elevated into a deed of bargain and sale. In Hanks vs. Folsom (11 Lea 555) it was held that the word "sell" in a conveyance clearly imports an executed undertaking to convey the land to the grantee in fee. The language in the deed in question is stronger than that contained in the deeds considered in the above cases. And when we turn from the deed itself to the circumstances attending the transaction, and the nature of the property which was being conveyed, the intention becomes still more apparent. The property was an interest in a mine and the mine was being worked under a lease. From the very nature of the property the substance of the estate might be taken away during the life of the lease. If the intention had been to convey an interest subject to the lease it would naturally have been expressed. The interest upon which Webber held a lease in the name of Nevett was undoubtedly considered a distinct and separate one from that involved in the action of ejectment. It was clearly the intention of Webber to convey to plaintiff in error an undivided interest in the prop-

erty in litigation. He had formerly owned an undivided one-third of the property, and, by his action of ejectment, still claimed to be the owner thereof. Neither had he ever relinquished possession of this interest. As we have seen, the question of actual possession is wholly immaterial in an action of ejectment in this State. The real consideration of the deed was legal services to be rendered in an action had for the purpose of settling the title. If the interest to be conveyed had in any manner depended upon the interest which should be recovered, or which should be accepted upon a settlement, a contract would naturally have been entered into stating these terms and conditions, instead of executing an absolute deed to a definite interest. Upon the very night of the settlement of September 26, 1884, the plaintiff had a settlement with Webber, in which it was recognized that he took his interest free from the lease, and on this settlement he received an order from Webber, signed by Nevett, for the amount due his interest upon this very theory, and this order was recognized and paid by the defendant in error. The subsequent testimony of Webber shows that there was a confusion in his mind as to whether the question was as to whether the interest of plaintiff in error was subject to the lease, or whether it was merely liable to the payment of a royalty,—a confusion which seems to have disappeared by the time he made his affidavit used upon the hearing of the motion for a new trial.

The question to be determined here is precisely the same as though this fund had been paid to Webber and the action was against him. Suppose this were the case, upon what principle could Webber claim, as against his deed, that a proportionate part of a leasehold estate should be withheld from the operation of his deed? If he could

do this why could he not claim, upon the same principle, that the entire interest should be subject to a lease?

Upon the question as to whether the defendant in error ever purchased, or pretended to purchase, this fund, we desire to make a further reference to the record. In the complaint (paragraph 12) it is alleged "that by virtue of the sale made by Henry Webber to the said Julia Webber, no part of the proceeds of said mine theretofore produced were sold to said Julia Webber," and this allegation is nowhere denied; it therefore stands admitted. The defendant in error claims under Julia Webber, and, as she had no right to this fund, he could have acquired none. The defendant in error, at the time he purchased from Julia Webber, did not claim this fund, for the record shows that it was placed in what was called a suspense account, and so remained until the defendant in error concluded to convert the same to his own use.

The result is that this fund belongs to the interest of plaintiff in error, and he is entitled to recover upon the second cause of action.

As to the cause of action stated in the first count, we merely refer to the last paragraph of our former brief.

A. W. RUCKER,
In Pro. Per.